

**In The OFFICE OF THE CLERK
Supreme Court of the United States**

STATE OF ARIZONA EX REL. ANDREW P. THOMAS,
MARICOPA COUNTY ATTORNEY,

Petitioner,

vs.

THE HONORABLE SILVIA R. ARELLANO, A JUDGE
OF THE SUPERIOR COURT OF THE
STATE OF ARIZONA, IN AND FOR THE COUNTY
OF MARICOPA, AND DENNIS RICCITELLI,

Respondents.

**On Petition For Writ Of Certiorari
To The Arizona Court Of Appeals**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent Dennis Riccitelli is an ordained priest of the Roman Catholic Church and was the pastor of Holy Cross Catholic Church. Riccitelli was indicted on ten counts of theft and four counts of fraudulent schemes and artifices. The Catholic Church is the victim of all of the crimes. Three years later, Riccitelli filed a motion to remand the case to the grand jury for a new probable cause determination, asserting that the State failed to instruct the grand jury on canon law and the policy and procedures of the Diocese. The Respondent Judge granted Riccitelli's motion, and ordered the State to instruct the grand jury on both canon law and Diocesan policy. The Arizona Court of Appeals and the Supreme Court of Arizona both denied the State relief from the Respondent's order.

1. The Establishment Clause of the First Amendment prohibits government action which does not have a secular purpose and which is excessively entangled with religion. Did the Respondent Judge's order violate the Establishment Clause by entangling church doctrine and policy with the required grand jury instructions?
2. The Equal Protection Clause of the Fourteenth Amendment prohibits, *inter alia*, denying citizens equal protection under the law. Did the Respondent Judge's orders

QUESTIONS PRESENTED – Continued

violate the Equal Protection Clause by providing Riccitelli with special rights and criminal defenses based upon his religious affiliation?

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OPINION BELOW

The Respondent Judge, who is a judge of the Maricopa County Superior Court, ordered the State to instruct the grand jury on canon law and Diocesan policy and procedure for consideration in determining whether probable cause exists to indict Dennis Riccitelli for theft and fraudulent schemes against the Catholic Church. The State challenged the ruling on the basis that it violated the parameters of the law which the State is required to present to the grand jury. Both the Arizona Court of Appeals and the Arizona Supreme Court declined to grant the State relief on this basis. The State then filed a motion for clarification, in which it asserted that the ruling violated both the Establishment Clause and the Equal Protection Clause. The Respondent Judge denied the State's motion, and the Arizona Court of Appeals declined to accept jurisdiction of the State's special action challenging the ruling. On January 6, 2009, the Arizona Supreme Court denied the State's petition for review.



STATEMENT OF JURISDICTION

The Arizona Supreme Court filed its decision denying review on January 6, 2009. This petition for writ of certiorari is timely filed within 90 days of that decision. This Court has jurisdiction pursuant to

United States Constitution Article III, Section 2; 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides in part that:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent Dennis Riccitelli was indicted on December 21, 2004, for one count of theft, a class 2 felony, eight counts of theft, class 3 felonies, one count of theft, a class 5 felony, and four counts of fraudulent schemes and artifices, class 2 felonies. The indictment alleged that these offenses were committed

between January 1, 2001, and December 31, 2003, when Riccitelli, who is an ordained priest of the Roman Catholic Church, was the pastor of the Holy Cross Catholic Church. Riccitelli filed a Motion to Remand for New Determination of Probable Cause on February 4, 2005, and requested an extension of forty-five days to file a substantive motion. On February 8, 2005, the trial court granted Riccitelli's request for an extension "to supplement the motion as needed."

More than twenty-seven months later, on May 14, 2007, Riccitelli filed a Motion to Dismiss Indictment or in the Alternative to Remand for a New Determination of Probable Cause. (App. E.) In his motion to remand, Riccitelli asserted that the State was required to instruct the grand jury on canon law and the policy and procedures of the Diocese. (*Id.*) In particular, Riccitelli contended that:

Canon law is the ecclesiastical *law* of the Roman Catholic Church. It is the foundation of a fully developed legal system with its own courts, judges and lawyers. Canon law is a legal specialty and its practitioners acquire specialized and advanced degrees in its study and interpretation.

(*Id.* at page 18; emphasis in original.) Riccitelli further opined that:

The Roman Catholic Church views itself as a complete society and therefore maintains the inherent right to govern itself according to

its own laws and procedures, including those concerning the administration of goods.

(*Id.* at 13.) The State filed a written response, objecting to the motion.

On July 6, 2007, the Respondent Judge remanded the matter to the grand jury for a new determination of probable cause, and ordered, *inter alia*, that the State instruct the grand jury on canon law and Diocesan policy and procedure. (App. C.) Specifically, the Respondent Judge found that:

[The] State failed to instruct the grand jurors on [canon] Law and Diocesan Policy and Procedure. The relevance of the evidence is clear; the grand jurors were required to make a determination of whether Defendant Riccitelli's conduct exceeded the authority granted him by church policies and law, and if so, did Defendant's conduct violate Arizona law. Church law and policies are directly relevant in determining whether Defendant committed the crimes he is charged with, that is, whether Defendant exceeded his authority in dealing with church financial matters.

(*Id.* at 2.)

Riccitelli filed a Motion to Dismiss on August 2, 2007, which argued that the case should be dismissed based upon the State's failure to file an indictment or complaint or commence grand jury proceedings within fifteen days of the Respondent Judge's order remanding the case. The State filed a written objection to

Riccitelli's motion. On August 21, 2007, the Respondent Judge denied the motion to dismiss.

The State filed a special action in which it asserted that, because canon law and the Diocese's policy and procedure are neither secular law nor clearly exculpatory evidence, the State is not required to present the information to the grand jury. After the Arizona Court of Appeals declined jurisdiction, the Arizona Supreme Court denied the State's petition for review.

The State then filed a motion for clarification with the trial court in which it asked that the July 6, 2007, order requiring the State to present the information to the grand jury be clarified so that it did not violate either the First or Fourteenth Amendments to the United States Constitution. (App. F.) The Respondent Judge denied the motion on May 19, 2008. (App. B.)

The State filed a Petition for Special Action in the Arizona Court of Appeals, which later declined to accept jurisdiction (App. G.) On January 6, 2009, the Arizona Supreme Court denied the State's petition for review. (App. D.)

REASONS WHY THE WRIT SHOULD BE GRANTED

This case provides an extraordinary example of the state court violating both the Establishment

Clause and the Equal Protection Clause by providing a defendant with special rights based on his religious affiliation. Arizona law requires that the grand jury be instructed on the applicable provisions of state law. The Respondent Judge's order that the State instruct the grand jury on canon law and Diocesan policy is not based on the requirements of Arizona law. Instead, the Respondent Judge chose to single out Riccitelli, inject his religion into the secular issue of probable cause, and provide him with special rights and criminal defenses.

This Court should reverse the Respondent Judge's ruling for at least two reasons. First, the ruling violates the Establishment Clause of the First Amendment which prohibits government action that does not have a secular purpose and which is excessively entangled with religion. Because Riccitelli is a priest and worked for the victim church, the Respondent Judge ordered the State to go beyond Arizona law and also instruct the grand jury on canon law and Diocesan policy and procedure. The Respondent Judge's order had no secular purpose and violated the Establishment Clause by entangling church rules and doctrine with the secular issue of whether probable cause existed to charge Riccitelli with a crime. If allowed to stand, the order permits criminal defendants to invoke their sectarian "rights" even in the grand jury context to frustrate criminal prosecutors. Criminal defendants could extend such an opportunity to scenarios such as Muslim suspects invoking sharia law, or members of certain sects of the Church

of Latter-Day Saints invoking church doctrine to ward off proper indictments for spousal abuse or child molestation.

Second, the Respondent Judge's ruling violates the Equal Protection Clause of the Fourteenth Amendment which prohibits, *inter alia*, denying citizens equal protection under the law. The State has not been ordered to instruct the grand jury on church doctrine and policy when non-clergy defendants were charged with offenses against a church. The Respondent Judge's orders violate the Equal Protection Clause because they provide Riccitelli with special rights and criminal defenses based upon his religious affiliation.

I. The Establishment Clause of the First Amendment prohibits government action which does not have a secular purpose and which is excessively entangled with religion. Because Riccitelli is a priest and worked for the victim church, the Respondent Judge ordered the State to go beyond Arizona law and also instruct the grand jury on canon law and Diocesan policy and procedure. The Respondent Judge's order had no secular purpose and violated the Establishment Clause by entangling church doctrine and policy with the required grand jury instructions.

The First Amendment of the United States Constitution provides, in relevant part, that "Congress shall

make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." This prohibition applies to states through the Fourteenth Amendment. *King v. Richmond County, Georgia*, 331 F.3d 1271, 1275 (11th Cir. 2003). "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" *Everson v. Board of Ed. of Ewing Township*, 330 U.S. 1, 16 (1947), quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

This Court has held that a governmental practice violates the Establishment Clause if: (1) it does not have a secular purpose; (2) its primary effect is to advance or inhibit religion; or (3) it fosters excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984). State action violates the Establishment Clause if it falls within any of these prongs. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). Furthermore, state action need not take the form of a statute to bring about constitutional scrutiny. "State acts may be legislative, administrative, or judicial; so long as they use state resources in a manner offensive to the Constitution, federal courts may act." *American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc.*, 510 F.Supp. 886, 890 (D.C. Ga. 1981).

The Respondent Judge's order violates the Establishment Clause because there is no secular purpose for requiring the State to instruct the grand jury on canon law and Diocesan policy and procedure. The

primary function of the grand jury is to determine whether probable cause exists to believe that a crime has been committed and that the individual being investigated was the one who committed it. *See State v. Baumann*, 610 P.2d 38, 42 (Ariz. 1980). In presenting a case to the grand jury, the State must instruct the panel on the relevant statutes. *See Crimmins v. Superior Court*, 668 P.2d 882, 886 (Ariz. 1983) (Instruction on all relevant statutes satisfies due process.) It is undisputed that canon law and church policy do not fall under the category of the laws of Arizona of which the State must instruct the grand jury.

The State is also required to present any clearly exculpatory evidence to the grand jury. *State v. Coconino County Superior Court*, 678 P.2d 1386 (Ariz. 1984). Clearly exculpatory evidence is evidence of such weight that it might deter the grand jury from finding probable cause. *Trebus v. Davis In and For County of Pima*, 944 P.2d 1235, 1239 (Ariz. 1997). Because the grand jury's function is to determine whether probable cause exists, and not to determine guilt, the State is not required to present all potentially exculpatory evidence. *Franzi v. Superior Court in and for Pima County*, 679 P.2d 1043, 1052-53 (Ariz. 1984); *Coconino County Superior Court*; *supra*; *Baumann*, *supra*.

The Respondent Judge's July 6, 2007, order did not find, nor does the evidence show, that canon law and church policy are clearly exculpatory in this case. Canon law and Diocesan policy establish for pastors

and parish administrators certain rights, duties, and obligations to the Catholic Church. (App. E at Exhibit A.) Contrary to Riccitelli's contention, "the pastor of a parish does not have unlimited discretion over parish finances, nor does he have the authority to spend the economic resources of a parish in a way that could potentially put the patrimony of the parish at risk." (*Id.*) Canons 1281-1289 specify the rules governing the administration of goods to which all pastors are bound, while other canons address the behavior of clergy and restrict certain activities such as the ability to engage in private business. (*Id.*) Applying the standard set forth by the Arizona Supreme Court in *Trebus, supra*, even if the grand jury were instructed on canon law and Diocesan policy and procedure, it would not have been of such exculpatory weight as to have deterred it from finding that probable cause existed that the defendant committed the offenses. Therefore, as canon law and church policy are neither state law nor clearly exculpatory evidence, there is no secular purpose for ordering the State to provide the information to the grand jury. *Cf. People v. Campobello*, 810 N.E.2d 307, 317 (Ill. App. 2004) (State subpoena for church records related to criminal investigation of a priest served a secular purpose, even though the church may violate canon law by releasing the information.)

By ordering the State to instruct on church doctrine and policies, the Respondent Judge also violated the Establishment Clause by causing the

laws of Arizona to become excessively entangled with religion. Excessive entanglement has been defined as an "impermissible merging or intermeddling of the proper spheres of religion and government." *American Civil Liberties Union of Georgia*, 510 F.Supp. at 892; see J. Madison, The Memorial and Remonstrance Against Religious Assessments P 11, reproduced in *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 719-27 (1970) (appendix to opinion of Douglas, J., dissenting), and quoted in *Lemon*, 403 U.S. at 633-34.

"Since at least the turn of the century, courts have declined to 'interfere [] with ecclesiastical hierarchies, church administration, and appointment of clergy.'" *Rweyemamu v. Cote*, 520 F.3d 198 (2nd Cir. 2008), quoting *Minker v. Balt. Annual Conference of the United Methodist Church*, 894 F.2d 1354, 1357 (D.C. Cir. 1990). It is not the role of secular courts to resolve issues that require the interpretation of religious doctrine. *Ran-Dav's County Kosher, Inc. v. State*, 608 A.2d 1353, 1374 (N.J. 1992) (A law which regulated kosher foods and required the state to interpret kosher laws violated the Establishment Clause as excessively entangled religion with government action.) Furthermore, taking legal sides in a religious dispute violates the Establishment Clause as it leads to excessive entanglement of government action with religion. See *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1038 (7th Cir. 2006) ("A suit to remove a priest on the ground that he is a heretic, or to reinstate a parishioner who has been

excommunicated, . . . has never been justiciable in the federal courts.”); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1304 (11th Cir. 2000) (The Establishment Clause mandates that churches retain exclusive control over strictly ecclesiastical matters. Investigation into church’s view of whether individual was suited for a particular clergy position excessively entangled government and religion of the church.)

However, secular legal action does not violate the Establishment Clause in disputes between a church and clergy where the issue does not involve questions of ecclesiastical doctrine or belief. *Dobrota v. Free Serbian Orthodox Church St. Nicholas*, 952 P.2d 1190, 1196 (Ariz. App. 1998) (Legal action between church and clergy did not cause excessive entanglement as the issue revolved solely around the calculation of money damages arising from a breach of contract.) Even in a criminal case where, as here, a defendant raises religious laws as a defense, the Establishment Clause is not violated where the finder of fact is not required to interpret church doctrine. *State of North Dakota v. Burckhard*, 579 N.W.2d 194, 195 (N.D. 1998). In *Burckhard*, the defendant was a priest charged with theft of church property, and claimed that he had authority under canon law to spend the church’s money for his personal purposes which were entirely unrelated to the church’s business. *Id.* The trial court granted the defendant’s motion to dismiss the complaint against him on the basis that the case excessively entangled religion

with state action. *Id.* The North Dakota Supreme Court vacated the dismissal, stating:

We are not convinced prosecution of these charges requires the court to interpret or review church doctrine, policy, or laws. As in any theft case involving allegations the defendant misused funds entrusted to him, the State will need to produce evidence, through testimony of church officials or other appropriate means, of the authority entrusted to the defendant and conduct outside that authority. It is for the factfinder to decide whether the defendant made unauthorized expenditures of church funds. The mere fact that a church official's wrongful conduct may violate church policy or canon law in no way precludes the same conduct from also violating and being prosecuted under secular criminal laws.

Id. at 201.

Although here the State charged Riccitelli with solely secular crimes against the victim-church, the Respondent Judge's order injected religious doctrine into the proceedings by ordering the State to instruct the grand jury on canon law and Diocesan policy. Whether or not Riccitelli's actions could be justified before a church tribunal under canon law is a separate and distinct issue from whether he violated the laws of Arizona. Canon 1344 acknowledges the legitimacy of the separate secular legal system. (App. E at Exhibit A.) The Respondent Judge, however, caused Riccitelli's religion and state action to become

excessively entangled, as it required the grand jury to define Riccitelli's authority over church funds based upon its interpretation of canon law. The State asks this Court to recognize the secular nature of the grand jury proceedings, and requests this Court to reverse the July 6, 2007, and May 19, 2008, orders so as not to entangle religious doctrine with legal rules and procedure.

II. The Equal Protection Clause of the Fourteenth Amendment prohibits, *inter alia*, denying citizens equal protection under the law. The State is required to instruct the grand jury on all applicable provisions of Arizona law. However, because Riccitelli is a priest and worked for the victim church, the Respondent Judge ordered the State to also instruct the grand jury on both canon law and Diocesan policy and procedure. The State has not been ordered to instruct the grand jury on church doctrine and policy when non-clergy defendants were charged with offenses against a church. The Respondent Judge's orders violate the Equal Protection Clause because they provide Riccitelli with special rights and criminal defenses based upon his religious affiliation.

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution prohibits, *inter alia*, denying citizens equal protection under

the law. "That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court." *Shelly v. Kraemer*, 334 U.S. 1, 14 (1948). This Court has recognized that, "[S]tate action in violation of the Amendment's provisions is equally repugnant to the constitutional commands whether directed by state statute or taken by a judicial official in the absence of statute." *Id.* at 15. In addition, this Court has recognized how the apparent state sanction of one religion over all others can cause violence and political divergence. *Engel v. Vitale*, 370 U.S. 421, 429 (1962) (Court provided historical overview of the Establishment Clause in holding that state school prayer program, which incorporated particular religious beliefs, violated the First and Fourteenth Amendments); *Eversen*, 330 U.S. 1, 11-13 (1947) (Court provided historical overview of need to separate church and state in holding that state transportation for both public and parochial school students did not violate the First and Fourteenth Amendments). To pass Equal Protection scrutiny, State action which treats groups of people differently must be shown to bear a rational relationship to a permissible state objective. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *McGowan v. Maryland*, 366 U.S. 420, 425 (1961).

The permissible state objective in overseeing the grand jury process is to insure that defendants are

afforded due process and that people are held accountable for their actions. Due to the very nature of the grand jury, defendants are not entitled to all of the protections that are afforded defendants in jury trials. *O'Meara v. Gottsfield*, 851 P.2d 1375, 1377 (Ariz. 1993). The Respondent Judge's July 6, 2007, and May 19, 2008, orders that the State instruct the grand jury on canon law and Diocesan policy and procedure clearly treats Riccitelli differently from others who have been charged with crimes against the church. In essence, those orders have provided Riccitelli with special rights and criminal defenses based upon his religious affiliation. The orders bear no rational relationship to the permissible state objective, and therefore violate the Equal Protection Clause.

CONCLUSION

This case is an extreme example of the state court violating both the Establishment Clause and the Equal Protection Clause by ordering the State to instruct the grand jury on church rules and policies for consideration in determining whether probable cause exists to indict a defendant. If the Respondent Judge's ruling is not reversed, the State will be forced to entangle the purely religious canon law and Diocesan policy and procedure into the secular structure of the grand jury, thereby violating the Establishment Clause. Furthermore, if allowed to stand, the Respondent Judge's ruling will violate the Equal Protection rights of the citizens by providing one individual, namely Riccetilli, with special rights and criminal defenses based upon his religious affiliation.

Respectfully submitted,

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APPENDIX A

STATE OF ARIZONA ex rel.) No. 1 CA-SA 08-0168
ANDREW P. THOMAS,)
Maricopa County Attorney,) DEPARTMENT C
Petitioner,) Maricopa County
Superior Court
v.) Cr 2004-043921-001SE
THE HONORABLE SILVIA) **ORDER**
R. ARELLANO, Judge of the) (Filed July 21, 2008)
SUPERIOR COURT OF)
THE STATE OF ARIZONA,)
in and for the County of)
MARICOPA,)
Respondent Judge,)
DENNIS RICCITELLI,)
Real Party in Interest.)

The court, Presiding Judge Michael J. Brown and Judges John C. Gemmill and Sheldon H. Weisberg, has considered the petition for special action filed by Petitioner, State of Arizona. After consideration,

IT IS ORDERED, in the exercise of its discretion, the court declines to accept jurisdiction of the special action.

IT IS FURTHER ORDERED vacating this court's previous order requiring the filing and service

App. 2

of a response to the petition on or before July 28,
2008

DATED this 21st day of July, 2008.

/s/ John C. Gemmill
JOHN C. GEMMILL,
Judge

1 CA-SA 08-0168

Maricopa County Superior Court
CR 2004-043921-00ISE

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Mesa AZ 85210-6201

App. 3

Philip G Urry, Clerk

By

/s/ [Illegible]

Deputy Clerk

APPENDIX B

**SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY**

CR2004-043921-001 SE	05/19/2008
HON. SILVIA R. ARELLANO	CLERK OF THE COURT E. Campo Deputy
STATE OF ARIZONA	SARAH N SILVESTER
v.	KENNETH F HULS
DENNIS RICCITELLI (001)	VICTIM SERVICES DIV-CA-SE

ORDER

(Filed May 20, 2008)

The Court has reviewed the State's Motion for Clarification of Order Requiring the State To Instruct the Grand Jury on Canon Law and Diocesan Policy and Procedure.

In its Motion, the State asks the Court to "... clarify and reconsider its prior order requiring the State to instruct the grand jury on both Canon Law and Diocesan policy and procedure." at page 12.

The State argues that the Court's July 6, 2007, Order violates the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

App. 5

The State does not argue that the Court's prior ruling is ambiguous or confusing. Rather, the State asks the Court to reverse its former ruling.

THE COURT FINDS that the State's Motion for Clarification is in actuality a Motion for Reconsideration and it will be treated as such.

Good cause not appearing,

IT IS ORDERED denying the State's Motion for Clarification of Order Requiring the State To Instruct the Grand Jury on Canon Law and Diocesan Policy and Procedure.

APPENDIX C

**SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY**

CR2004-043921-001 SE	07/06/2007
HON. SILVIA R. ARELLANO	CLERK OF THE COURT E. Campo Deputy
STATE OF ARIZONA	SARAH N SILVESTER
v.	KENNETH F HULS
DENNIS RICCITELLI (001)	MICHAEL D KIMERER COUNTY ATTORNEY – GRAND JURY VICTIM SERVICES DIV-CA-SE

ORDER

(Filed July 6, 2007)

The Court has considered the Defendant's Motion To Dismiss Indictment or in the Alternative To Remand for a New Determination of Probable Cause, the State's Response, Defendant's Reply, the Grand Jury Transcript of proceeding of December 21, 2004, and the record herein.

The Court finds Rule 12.9(a) Arizona Rules of Criminal Procedure and *Crimmins v. Superior Court*, 137 Ariz. 39, 668 P.2d 882 (1983) and *Nelson v. Roylston*, 137 Ariz. 272, 669 P.2d, 1349 (Ct App.1987) controlling.

App. 7

The Court finds that Defendant has been denied, in part, a substantial procedural right by the States' use of intentional and unintentional false or misleading and incomplete evidence to the grand jurors. That misleading, false, and incomplete testimony was used by the grand jurors as the basis for finding probable cause.

Specifically, regarding the existence of a finance committee/council, the Court finds that Detective Baran [sic] repeatedly testified that there was no finance committee or council at Holy Cross Church while Defendant was Pastor, that the committee did not meet the criteria of a finance committee, that Defendant Riccitelli had unlimited access to all church funds, that Defendant Riccitelli acknowledged there was no finance committee even though church policy required the existence of one. However, the evidence in the State's possession clearly establishes the existence of a finance committee at Holy Cross. Committee reports were prepared and kept and Diocesan audits were conducted. Detective Baron and Montana knew of the existence of the Diocesan audits and reviewed the audit reports and related documents during their investigation.

The Court finds that the false and misleading testimony regarding lack of a finance committee was material (i.e. evidence that which can affect the outcome of a proceeding) to the grand jurors' determination of probable cause in connection with the theft and fraud charges.

The Court further finds that the State presented incomplete and misleading testimony regarding the rental properties at issue. The State alleges that Defendant Riccitelli owned various rental properties and rented the properties to the church and charged excessive rents or above market price. Detective Baran [sic] quoted specific rental rates during his grand jury testimony. However, the evidence in the State's possession shows that other properties were rented at or below market price. This evidence was not presented to the grand jury. Once the State presented evidence of rental rate it was bound to present complete and accurate evidence on that issue, inculpatory and exculpatory evidence. The Court finds that this misleading and incomplete testimony denied Defendant Riccitelli a substantial procedural right.

The Court further finds that State failed to instruct the grand jurors on Cannon Law and Diocesan Policy and Procedure. The relevance of the evidence is clear; the grand jurors were required to make a determination of whether Defendant Riccitelli's conduct exceeded the authority granted him by church policies and law, and if so, did Defendant's conduct violate Arizona law. Church law and policies are directly relevant in determining whether Defendant committed the crimes he is charged with, that is, whether Defendant exceeded his authority in dealing with church financial matters.

The Court finds the State's failure to present evidence of cannon law and procedures amounts to a deprivation of a substantial procedural right.

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The Court finds that the State's presentation regarding the relationship between Defendant Riccitelli and Esther Kircher appropriate.

Accordingly,

IT IS ORDERED remanding this matter to the Grand Jury for a new determination of probable cause.

IT IS FURTHER ORDERED vacating all further proceedings before this Court.

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APPENDIX D

[SEAL]

Supreme Court

STATE OF ARIZONA

402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET
PHOENIX, ARIZONA 85007-3231
TELEPHONE: (602) 452-3396

RACHELLE M. RESNICK SUZANNE D. BUNNIN
CLERK OF THE COURT CHIEF DEPUTY CLERK

January 7, 2009

RE: STATE ex rel THOMAS v HON.
ARELLANO/RICCITELLI
Arizona Supreme Court No. CV-08-0274-PR
Court of Appeals Division One No.
1 CA-SA 08-0168
Maricopa County Superior Court No.
CR 2004-043921-001SE

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on January 6, 2009, in regard to the above-referenced cause:

ORDERED: Petition for Review of a Special Action Decision of the Court of Appeals = DENIED.

Record returned to the Court of Appeals, Division One, Phoenix, this 7th day of January, 2009.

Rachelle M. Resnick, Clerk

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TO:

Kenneth F Huls, Kimerer & Derrick

Hon Silvia R Arellano, Judge, Maricopa County

Superior Court, Southeast Court Building

West Publishing Company

Lexis Nexis

Philip G Urry, Clerk, Court of Appeals,

Division One, Phoenix

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APPENDIX E

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Attorneys for Defendant Riccitelli

**IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA**

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	) Case No.
Plaintiff,	) CR2004-043921-001-SE
v.	) MOTION TO DISMISS
DENNIS RICCITELLI,	) INDICTMENT OR IN
Defendant.	) THE ALTERNATIVE TO
	) REMAND FOR A NEW
	) DETERMINATION OF
	) PROBABLE CAUSE
)
	) (Oral Argument Requested)
)
	) (Assigned to the
	) Hon. Silvia R. Arellano)

Defendant Dennis Riccitelli, pursuant to Rule 12.9, Arizona Rules of Criminal Procedure, requests that this Court dismiss the indictment or in the alternative remand the case to the Grand Jury for a new determination of probable cause. This motion is

made pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article II, §§ 2 & 24 of the Arizona Constitution, and Rule 12.9 of the Arizona Rules of Criminal Procedure, and is supported by the attached Memorandum of Points and Authorities, as well as argument to be presented for the Court in the hearing hereby requested.

RESPECTFULLY SUBMITTED this 14th day of May, 2007.

Kimerer & Derrick, P.C.

/s/ [Illegible]

Michael D. Kimerer

Kenneth F. Huls

Attorneys for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL OVERVIEW

Dennis Riccitelli is charged in this matter under a fourteen count indictment for theft, a class 3 felony (counts 1, 4, 7, 8, 9, 11, 12 and 14), fraudulent schemes and artifices, a class 2 felony (counts 2, 6, 10 and 13), theft, a class 2 felony (count 3) and theft, a class 5 felony (count 5) for acts allegedly committed between January 1, 2001, through December 31, 2003.

Dennis Riccitelli is an ordained priest of the Roman Catholic Church, Diocese of Phoenix, who was

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Pastor of the Holy Cross Catholic Church ("HCC") in Mesa while the acts complained of were allegedly committed.

It is variously alleged that Fr. Riccitelli committed illegal and fraudulent transactions involving HCC funds while he was Pastor. Only four counts in the indictment are pled with any specificity as to the acts alleged (counts 2, 6, 10 and 13).

The investigation was primarily conducted by Mesa Police Department Document Crimes Unit Detectives Baran [sic] and Montana after Rev. Richard Moyer reported possible financial indiscretions by Fr. Riccitelli and codefendant Blaise Meyers [sic] on March 4, 2004. The allegations include: alleged cash reimbursements for dining out expenses already paid by HCC credit cards; alleged cashing of checks made payable to Dennis Riccitelli without supporting documentation as valid church expenses; alleged personal and unlawful profit at the expense of HCC by renting personally owned homes to HCC for more accommodations than were necessary for visiting priests and at a higher than market rate and without proper disclosures; alleged misuse of HCC funds for pilgrimages in which it is alleged that Fr. Riccitelli and a friend, Ester Kircher, personally benefited; and the alleged payment of a "ghost salary" to Ms. Kircher out of HCC funds.

The allegations were presented to the grand jury without providing the grand jurors with the relevant financial guidelines and canon law governing the role

of the pastor in financial matters and the use of parish funds.

II. LAW AND ARGUMENT

DENNIS RICCITELLI WAS DENIED A SUBSTANTIAL PROCEDURAL RIGHT BY THE STATE'S PRESENTATION OF FALSE, MISLEADING, INCOMPLETE AND *PERJURED* TESTIMONY, AS WELL AS BY INTERFERING WITH THE GRAND JURY'S INQUIRY.

Rule 12.9(a) of the Arizona Rules of Criminal Procedure allows the accused to challenge the grand jury proceedings when he is denied a substantial procedural right. The Arizona Supreme Court has held that an accused is entitled to due process during grand jury proceedings, requiring the use of an unbiased grand jury and a fair and impartial presentation of the evidence. *Crimmins v. Superior Court*, 137 Ariz. 39, 41, 668 P.2d 882, 884-85 (1983). The *Crimmins* court remanded the case for a redetermination of probable cause because the police officer inaccurately represented facts in his testimony and the prosecutor failed to instruct the grand jurors on the applicable statutes.

A prosecutor has a specific duty to inform the grand jury if the testimony of a witness is erroneous or misleading in order to ensure the accused is afforded due process. *Escobar v. Superior Court*, 155 Ariz. 298, 301-302, 746 P.2d 39, 41-42 (Ariz.App.

1987). In *Escobar*, the court remanded the case based on a finding that the officer did not provide the grand jurors with a fair and impartial presentation of the evidence. The court further concluded that the prosecutor was aware of the erroneous testimony and should have informed the court and the grand jury to ensure that the grand jury would not base an indictment on erroneous testimony.

In several decisions regarding false and misleading testimony before the grand jury, Arizona courts have followed *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974), which held that the accused's due process rights are violated "when a defendant has to stand trial on an indictment which the government knows is based partially on perjured testimony . . ." Arizona courts have further recognized that the testimony need not be actually perjured but only misleading. *Nelson v. Royston*, 137 Ariz. 272, 669 P.2d 1349 (Ct. App. 1987). The *Nelson* court noted that although *Basurto* and the line of cases on which it is based have as their foundation the use of perjured testimony, "it is not the fact that the testimony is perjurious but rather the evidence, whether intentionally or unintentionally false, has been presented to the trier of fact and is used as a basis for finding probable cause." *Nelson* at 277. The court held that the accused was denied a substantial procedural right by having an indictment returned against him with the use of misleading testimony on a material matter.

In a subsequent decision, the Arizona Supreme Court further clarified the duties of the prosecutor in

presenting evidence before the grand jury. In *State v. Coconino County Superior Court (Mauro)*, 139 Ariz. 422, 678 P.2d 1386 (1984), the court adopted a "clearly exculpatory" evidence standard for determining what evidence the prosecutor has a duty to present to the grand jury. The *Mauro* court adopted the standard that the State is not required to present exculpatory evidence to the grand jury unless it is requested by the grand jury or the evidence is clearly exculpatory. Clearly exculpatory evidence is "evidence of such weight that it would deter the grand jury from finding the existence of probable cause." *Id.* at 1389.

A. The State Repeatedly Presented Patently False, Misleading and *Perjured* Testimony That There Was No Finance Committee or Council at Holy Cross Parish While Dennis Riccitelli Was Pastor.

The grand jury was told numerous times during the prosecution's presentation that there was no finance committee or council at HCC while Dennis Riccitelli was Pastor. Such testimony, which was reiterated and highlighted throughout the State's presentation, was patently false. Moreover, the truth was known to the witnesses and was either known or should have been known by the prosecutor.

Det. Baron testified that "under Dennis Riccitelli at Holy Cross, there was no finance committee." (Grand Jury Transcript "GJT" p. 15, line 6). He compounds the false statement and elaborates in a

grossly misleading manner by testifying that "[t]here was no finance committee the entire time that he was there that met the criteria of a finance committee as according to the guidelines of the Diocese in that Riccitelli was solely in charge, once he made pastor, of all the financial transactions of the church." (GJT, p. 15, line 7). If the witness intended to clarify that he misspoke and there actually was a finance committee, but that it did not meet certain standards, his words did nothing to clarify his false testimony. In fact, this second statement, taken in context with his former clear and unambiguous statement, only served to reinforce the strong false impression left by his first false statement. The statement also confirms the obvious, that Det. Baron *knew* the truth.

Det. Baron almost immediately continues his false testimony on the point by falsely elaborating shortly thereafter. He testified that Diocesan auditors on several occasions "discovered that there was no finance committee" and advised in their reports "that he needs to get one." (GJT, p. 15, line 17). No audit reported any such finding. In fact, the audits revealed the *existence of* an active finance committee.

Det. Baron elaborated by falsely advising the grand jury that Fr. Riccitelli responded by saying at least twice, "[y]eah, I know that we need a council, and I'm trying to get one together, and we'll work on that,' but it never happened." (GJT, p. 15, line 21). Fr. Riccitelli made no such response because the parish did in fact have a finance committee. This false testimony is, if possible, worse because it falsely

attributes statements to Fr. Riccitelli in which he allegedly acknowledges the lack of a committee and unfulfilled intentions "to get one." This false testimony could only have been presented with the intention of making the State's case for fraud.

In fact, there was a Finance Committee at HCC throughout the entire period of time that Fr. Riccitelli was Pastor. In addition to Fr. Riccitelli, in his capacity as Pastor, and Tamara Duke, in her capacity as Bookkeeper, the Committee was composed of Lester Shane, Lloyd Larscheid and Ernie Chaladyn. Duke prepared the committee reports.

This information was known to the State and testifying detectives at the time of the Grand Jury presentation. *The very Diocesan audits referenced by Det. Baron as having "discovered" the lack of a finance committee, actually confirm that there was a committee.* (Internal Control Review, Holy Cross, 2001, Bates 00936; Internal Control Review, Holy Cross Parish, December 1-5, 2003, p. 31, Bates 001186). Both audits have sections entitled, "FINANCE COUNCIL," and discuss the particulars of the operations of the existing Finance Council. These documents were supplied by the State to the Defense pursuant to its duties of discovery. *See attached A.*

The impact of this repetitive false testimony on the grand jury can not be overstated in a case of alleged theft and fraud. In fact, before the witness was excused, a grand juror much later asked whether there was a finance committee prior to Fr. Riccitelli's

tenure; thereby illustrating the impact of the point on the jurors' minds. The detective ambiguously advised that he did not know. (GJT, p. 42, line 2). Another grand juror immediately then asked, "[w]as there a contractual agreement between the Father and the church with the handling of money? Did he have unlimited access?" (GJT, p. 42, line 6). The first question was completely ignored by the detective. The latter question was answered in a false and misleading manner by Det. Baron. He answered that "[t]here was unlimited access for all of the funds of the church by Riccitelli." (GJT, p. 42, line 9).

The correct response to the first question is that the handling of money in a general sense was governed by canon law and the pertinent policies and procedures. But this was not stated. The answer to the second and related question is incorrect. Fr. Riccitelli did not have unlimited access. In fact, he was never involved in either counting money or making deposits. The parish had a bookkeeper and a finance committee and his actions were governed by canon law and Diocesan policy.

The impact made by the repetitive false testimony is further evidenced by the next set of questions and answers. The grand juror then asked, "[s]o he had free reign?" To which the detective responded, "[t]otal access, total control." (GJT, p. 42, line 11). The juror then asked whether this was typical of the churches, and the detective advised that it was not. (GJT, p. 42, line 13). In response to yet another grand juror question, the detective yet again falsely testified

that the Diocese had directed Fr. Riccitelli to "get a finance committee." (GJT, p. 43, line 1).

This false testimony was later reintroduced and underscored by the witness in his response to a question from the prosecutor, which in turn was an attempt to follow up on an unanswered question from a grand juror. The grand juror asked "was it typical of the Roman Catholic church to allow priests free reign like this financially? In other words, did he have cause to expect that his case was no different than anyone else?" (GJT, p. 45, line 23.) The prosecutor then established through the detective that parishes are supposed to have finance committees, and asked the detective "there was no such financial committee at the Holy Cross Church, is that correct?" (GJT, p. 46, line 24). The witness's response was, "yes."

This exchange demonstrates the impact of the false testimony on the grand jury as it leads to the conclusion that Fr. Riccitelli had "free reign" over financial matters. The repeated false testimony on this point and the prosecutor's returning to and eliciting this false testimony yet again in response to the grand juror's question regarding "free reign" directly highlighted the false testimony and invited, if not directed, the grand jurors to make this conclusion based on the false testimony.

Presenting perjured or false and misleading testimony to the grand jury denies a defendant a substantial procedural right and constitutes a denial of due process. *United States v. Basurto*, 497 F.2d 781

(9th Cir. 1974); *Escobar v. Superior Court*, 155 Ariz. 298, 746 P.2d 39 (Ariz.App. 1987); *Nelson v. Royston*, 137 Ariz. 272, 669 P.2d 1349 (Ariz.App. 1983).

The *Basurto* court held that the Due Process Clause is violated when 1) an indictment is based partially on perjured testimony, 2) the testimony is material and 3) and jeopardy has not attached. A prosecutor who learns of *any* perjured testimony has a duty to inform the court and defense counsel. If the testimony *may* be material, the prosecutor must also inform the grand jury. *Id.* at 786. In *Basurto*, the testimony in question was that of a testifying co-conspirator who *later* informed the prosecutor of his perjured testimony.

In this case the testifying witnesses, the state's agents, *knew* that the testimony was inaccurate. Presumably the prosecutor had knowledge of the true facts as well but ignored his duty to clarify the perjured testimony.

The false testimony amounts to perjury as defined by A.R.S. § 13-2702. Perjury is a false sworn statement in regard to a material issue, believing it to be false. Of course, the witnesses testified under oath. As previously stated, the witnesses testified that the diocesan audits revealed that there was no finance committee, when in fact the audits clearly documented the opposite. The witnesses had possession of the documents, referenced them, and knowingly presented the opposite of what those documents recorded.

Their false testimony was material. Materiality is defined by A.R.S. § 13-2701(1) as that which could have affected the course or outcome of any proceeding. That such testimony is material to the issue of theft and fraud can hardly be disputed given the emphasis placed on the subject by the witnesses' repetition of the false and perjured testimony and the response of the grand jurors. The issue of oversight in a financial fraud case strikes to the heart of the issue of fraud and intent. This is especially true given the false testimony that Fr. Riccitelli acknowledged the lack of a committee, stating that he needed to form one, and then knowingly and willingly failed to do so. The only conclusion that a grand juror could draw from such false facts is that Fr. Riccitelli failed to do so in order to continue fraudulent acts without detection or interference.

The State's actions by presenting false and perjured testimony violated Dennis Riccitelli's rights to due process, deprived him of a fair and impartial presentation of the evidence and denied him a substantial procedural right. This gross violation of Fr. Riccitelli's rights may be remedied by a dismissal of the indictment. The only remedy in the absence of a dismissal of the indictment is a remand to the grand jury for a new determination of probable cause.

B. The State Presented Incomplete and Misleading Testimony Regarding the Rental of Properties Owned by Fr. Riccitelli.

The State alleges that Fr. Riccitelli rented properties owned by him to HCC for an above market price. Det. Baran [sic] testified to the grand jury that Fr. Riccitelli and the codefendant charged "more than they'd been paying any of the other companies (from whom HCC previously rented properties)." (GJT at p. 30, line 23). He also testified that they previously paid (and thus HCC paid) \$1227.00 to \$1740.00 per month for apartment rentals for visiting priests, but "they started off charging \$2400.00 a month for their properties."

This is grossly incomplete and misleading testimony. First, the rates charged for the properties owned by the defendants were for homes, not apartments. Additionally, the Discovery provided by the State indicates that the properties in question were frequently rented for much lower fees than stated by the witness. One home was rented for \$1200.00 per month, another for \$1000.00 per month, and yet another for \$1400.00 per month. In fact, the State's own discovery reveals that the homes were often rented for rates that were lower than those asked for one bedroom apartments. The discovery documents a one bedroom apartment renting for \$1760.00 per month, and another for \$1672.00. Moreover, the discovery reveals that a visiting priest charged \$2079.63 for eight days at the Arizona Golf Resort.

The State's own reports refute the testimony that rents charged by Dennis Riccitelli were excessive. This evidence was known by the prosecution as well as its witnesses who not only failed to present the exculpatory evidence, but testified in a grossly misleading fashion thereby denying Dennis Riccitelli a substantial procedural right. *Crimmins*, 137 Ariz. 39; *Escobar*, 155 Ariz. 298; *Basurto*, 497 F.2d 781; *Nelson*, 137 Ariz. 272; *Mauro*, 139 Ariz. 422.

C. The State Presented False and Unfairly Prejudicial Testimony Implying an Improper Sexual Relationship Between Fr. Riccitelli and Esther Kircher In Its Attempts to Secure an Indictment.

The State generally alleges that Fr. Riccitelli made fraudulent payments to Esther Kircher as a bogus employee. In order to provide a motive, the State presented false and scandalous testimony regarding the nature of the relationship between Fr. Riccitelli and Ms. Kircher and directly implied that a sexual relationship had existed between the two. This testimony was without support, as later admitted by one of the witnesses.

Det. Baron testified to the grand jury that Ms. Kircher and Fr. Riccitelli "were together." (GJT at p. 35, line 5). It was also stressed that she was a widow. The inflammatory allegation is obvious in context of the question and answer. Furthermore, it is known from interview tapes supplied by the State that

investigating detectives believed that Fr. Riccitelli was involved in an inappropriate relationship with Ms. Kircher. An improper sexual relationship in violation of the priest's vows was directly and intentionally implied. The intentional implication took root as evidenced by a grand juror later asking Det. Montana for further information about the relationship, concluding her question with "or is it just something I don't want to know about?" He ambiguously responded, "[w]ell, we don't know." (GJT at p. 72, line 3).

The prosecutor was concerned enough about the obvious impact of the incendiary allegation that he specifically asked the detective to agree that his investigation did not reveal an improper relationship between the two. (GJT at p. 73, lines 5-9). However, the allegation remained and the impact of such an inflammatory and scandalous allegation can not be undone. The jurors' imaginations were left to run wild.

The legal allegation is that during 2002 and 2003, Dennis Riccitelli placed Esther Kircher on the payroll and paid her \$16,881.56 from Church funds for performing housekeeping services that were allegedly never performed. The State provided testimony that the "real" housekeeper was one Pam Deskins, who allegedly told detectives she provided those services, herself, and that Ms. Kircher had not. Ms. Kircher has since died of cancer and can not defend herself or assist Dennis Riccitelli in his defense.

There was no improper sexual relationship between Kircher and Riccitelli. They were friends. Ms. Kircher provided housekeeping and cooking services for Dennis Riccitelli for 17 years without compensation (from her husband's death in 1985 until her bankruptcy in 2002), and continued to perform those services until she was too ill to continue. Deskins worked only 2 or 3 days per week, and according to the State's own testimony her duties consisted only of cleaning. (GJT at p. 38, line 1). In contrast, Ms. Kircher did the shopping, cooking and laundry throughout the week, and also cleaned in Doeskins' [sic] absence. Note that Ms. Kircher died on Sept. 7, 2003 (GJT at p. 38, line 7), and was paid only through June 25, 2003 (GJT at p. 37, line 8).

Though the factual inaccuracies discussed above may be factual disputes more properly resolved by trial and not in and of themselves constitute an issue for remanding the matter to the grand jury, the unsubstantiated, unsupported and untrue allegation of an improper sexual relationship between Fr. Riccitelli and Ms. Kircher was intentionally and improperly presented to the grand jury as motive for the allegedly fraudulent payment of salary and could only have unfairly prejudiced the grand jurors against Fr. Riccitelli thereby denying him a substantial procedural right.

D. The State Presented False, Misleading and Incomplete Testimony Regarding the Pastor's Role in Financial Matters, Failed to Instruct the Grand Jury on Relevant Canon Law and Diocesan Policy and Procedure and Impermissibly Interfered with Questioning by the Grand Jurors.

The nature of the pastor's and finance committee's roles in administering the temporal goods of the parish was falsely explained to the grand jury.

Det. Ronald Baron falsely testified that the parish contacts the finance council or committee regarding "any expenditures" that the parish wishes to make for discussion and approval (GJT at p. 14, line 24). It is accurate that parishes are to have finance councils or committees; however, it is false that such bodies approve "any expenditures." The alleged role is nowhere to be found in the *Diocesan Financial Administrative Policies, Procedures and Guidelines* (hereinafter, "*Diocesan Policies*"), the relevant Diocesan policy guide which was provided to the Defense by the State in discovery. Likewise, this capacity is not found in canon law. The committee is a reviewing body and does not function in a comptroller capacity by approving all expenditures. The council reviews monthly reports of expenditures, but does not approve individual expenditures. The pastor has authority and discretion to spend on behalf of the parish subject to certain limitations. One such limitation is a cap of \$20,000 on an individual expenditure. In such instances, the parish must seek approval of

the Bishop. (See *Attached B. FIN - 14*, Diocesan Policies and Procedures). This limitation was properly presented to the grand jury.

The Roman Catholic Church views itself as a complete society and therefore maintains the inherent right to govern itself according to its own laws and procedures, including those concerning the administration of its goods. Canon 1254 § 1, reads: The catholic Church has the inherent right, independently of any secular power, to acquire, retain, administer and alienate temporal goods, in pursuit of its proper objectives. § 2 follows: These proper objectives are principally the regulation of divine worship, the provision of fitting support for the clergy and other ministers, and the carrying out of works of the sacred apostolate and of charity, especially for the needy.

A parish is a juridic person. Can. 515 - § 3. All temporal goods belonging to juridic persons of the Church are ecclesiastical goods and are regulated by the Code of Canon Law, as well as their own statutes. Can. 1257 § 1. The pastoral care of the parish is entrusted to the pastor. Can. 515 - § 1. Pastoral care includes the governing of the parish. The pastor represents the parish in all juridical affairs, including the administration of its goods in accordance with canon law. Can. 532. The responsibility for the administration of all parish ecclesiastical goods lies with the pastor. Can. 1279 § 1. In other words, the pastor is responsible to decide upon the proper use of the goods of the parish.

Accordingly, the pastor has broad authority and discretion in the financial operation of the parish. The State's presentation to the grand jury was orchestrated to present the opposite picture. There are additional examples.

Det. Baron falsely testified that a pastor's food allotment or board is limited to "whatever groceries would be for a single person per month." (GJT at p. 16, line 25). This is nowhere to be found in the Diocesan Policies or canon law. Likewise, Det. Baron falsely testified that it is a violation of Diocesan financial guidelines for the pastor to write checks to himself. (GJT at p. 18, line 25). This proscription is nowhere to be found in the Diocesan Policies or canon law.

The grand jury was falsely instructed as to the pastor's actual authority in financial matters pursuant to canon law and Diocesan Policies. In a case of alleged fraud and theft by the pastor, such false and incomplete testimony could only have been presented to convince the jurors that Dennis Riccitelli was engaging in fraud and theft. The pastor's authority in expenditures and financial matters generally goes to the heart of the accusations and pertinent legal issues. This false and incomplete testimony denied Dennis Riccitelli a substantial procedural right.

The grand jury was never presented with the relevant portions of canon law and Diocesan Policies in order to make an independent determination of whether Fr. Riccitelli's actions exceeded the authority

granted him by church law and policy. The witnesses simply testified that Fr. Riccitelli's actions exceeded that authority, which then formed the basis for the grand jury's determination that Fr. Riccitelli violated Arizona law. Essentially, the grand jury was given the conclusion and the jurors were unable to make their own analysis. The presentation orchestrated a foregone conclusion of probable cause. Such a presentation invaded the province of the grand jury and robbed the grand jury of its broad powers to conduct an independent investigation and duty to independently determine probable cause. As such, Dennis Riccitelli was denied his right to a fair and impartial presentation of the law and evidence, a therefore a substantial procedural right.

As referenced previously, at the conclusion of Det. Baran's [sic] testimony a grand juror asked the following, "[s]o he had free reign, free control?" (GJT at p. 42, line 11), and the witness incorrectly responded, "[t]otal access, total control." This question was asked in the context of discussion concerning the falsely alleged lack of a finance committee and its implications. The grand juror then asked whether this was typical, following which she was advised that it was not. (GJT at p. 42, line 13). The juror then asked whether the Diocese had anything to say on the matter, and ambiguously whether something was written down, to which the Det responded that there were "guidelines" and "documentation" regarding the audits and falsely alleged lack of a finance committee, as well as Fr. Riccitelli's falsely presented and

characterized response that he was going to remedy the lack of a committee. (GJT at p. 43, line 119).

This was the preamble to the juror's asking, "[b]ut there was no legal constraint to require him to do so." (GJT at p. 43, beginning on line 7). Det. Baran [sic] answered, "[w]ell, there's canon law. That would be a legal restraint." The prosecutor then interjected, and elicited that there was no written contract between Fr. Riccitelli and the parish or the Diocese, and followed by asking "[t]here are a list of rules, guidelines/canon law that the Catholic Diocese of Phoenix expects their priests to abide by, is that correct?" The witness answered in the affirmative. The prosecutor continued, "[y]ou're not talking about an Arizona statute. You're talking about guidelines/canon law." The witness answered in the affirmative without elaboration. The grand juror then dropped the subject.

By this exchange, and in response to questioning by a grand juror, the prosecutor downplayed the role of canon law and Diocesan Policies in determining whether Fr. Riccitelli exceeded his authority as pastor in administering the goods of the parish. Yet, canon law and Diocesan Policies are directly relevant in determining whether Fr. Riccitelli committed indictable offenses in the context of his employment since the issue hinges on his authority in financial matters. The grand jury should have been fully instructed on applicable canon law and Diocesan Policies, but the prosecution failed to do so and diverted the attention of the grand jury when it was inquiring about

relevant law. This was done after the testifying witness strongly suggested that Fr. Riccitelli *had* violated canon law, as well as policy and procedure, but without providing the grand jury with the law and policy that he allegedly violated.

The previously discussed testimony and exchange on pages 45 through 47 of the transcript further demonstrate the problem. In that instance, the grand juror asked whether comparisons were ever made as to financial arrangements at other parishes and inquired about precedent. Though the question was clear on its face, the prosecutor asked the grand juror to clarify the question. The juror responded by asking whether Fr. Riccitelli had any cause to believe his "case" was different. The detective answered that he did not know how to answer the question because he believed that it called for the defendant's thoughts, though the first question regarding comparisons and precedent could have been answered with a "yes" or "no." Due to the reluctance of the witness and the prosecutor's interference with the grand juror's valid inquiry, that question was never answered.

Instead, the prosecutor asked the witness whether there were expectations by the church based on canon law and Diocesan regulations. (GJT at p. 46, line 9), He then suggested a conclusion, asking "[a]nd priests are not allowed to or given permission to use Diocese funds or parish funds for the personal expenses that we talked about here today, is that correct?" (GJT at p. 46, line 14). Both questions were answered in the affirmative. He followed this by

again eliciting the false testimony that there was no finance committee at the parish.

In addition to the fact that the grand juror's question was never answered, the prosecutor elicited the broad conclusion that Dennis Riccitelli's actions were contrary to canon law and Diocesan Policies without advising the grand jury of the relevant canon law, policy and procedure. The grand jurors were deprived of their ability to determine for themselves whether Dennis Riccitelli exceeded his authority in financial matters and thereby potentially committed a crime. The prosecutor presented conclusions and again drew the jury's attention to the false allegation that there was no finance committee and directly linked probable cause to the false allegation.

Despite this treatment, the grand jury's concerns about the relevance of canon law in determining probable cause persisted as evidenced by yet another grand juror's question put to the prosecutor after all witnesses were excused and the prosecutor called for legal questions. The juror asked the prosecutor, "[c]an you explain canon law a little bit?" The prosecutor responded "[t]hose are regulations put in place by the Catholic Diocese that regulate church activity that are not Arizona Revised Statutes in terms of criminal law that you should consider in terms of violations of law that would be included in an indictment in any one case, for example." (GJT at p. 75, beginning on line 22). The juror reacted to this downplaying of the role of canon law in determining a pastor's authority

by asking, "[s]o these are policies and procedures?" The prosecutor answered in the affirmative.

In *Nelson v. Royston*, 669 P.2d 1349, 137 Ariz. 272 (Ariz.App. 1983), the court dealt with very similar interference by a prosecutor before the grand jury. In that case, a grand juror asked the witness for information about the defendant's mental condition. The prosecutor interrupted and stated that she did not think that the inquiry was relevant to the offense. Following the impermissible interjection, the responses from the witness were at best misleading. The court reasoned that the grand jurors' questions indicated that they may have thought that the mental state of the defendant was relevant to their determination of probable cause, and held that "No bar such inquiry denied petitioner a substantial procedural right." *Id.* at 1353, 276. In this case, the prosecutor similarly interfered with the grand jury's inquiry and elicited incorrect and misleading testimony to redirect the grand jury's concerns.

Canon law is not policy and procedure. It not "put in place by the Catholic Diocese." Canon law is the ecclesiastical *law* of the Roman Catholic Church. It is the foundation of a fully developed legal system with its own courts, judges and lawyers. Canon law is a legal specialty and its practitioners acquire specialized and advanced degrees in its study and interpretation. The prosecution and its witnesses alleged violations of the Code of Canon Law without providing the basis for the alleged violations and alternately

downplayed its significance in determining whether a crime had been committed.

In fact, if the grand jury had been properly instructed on canon law, the grand jury could easily have determined that probable cause was lacking as to most, if not all, counts in the draft indictment. Therefore, the law was both relevant and material. The failure to present that law was also a failure to present clearly exculpatory information and therefore a deprivation of a substantial procedural right. *Crimmins*, 137 Ariz. 39; *Mauro*, 139 Ariz. 422.

In addition to relevant canon law, specific Diocesan Policies should have been provided to the grand jurors for their determination of whether Dennis Riccitelli exceeded his authority as pastor.

The prosecution elicited testimony that Fr. Riccitelli did not have permission to use church credit cards for personal dining. Specifically, the grand jury was advised that "[h]e was not allowed a personal dine out." (GJT at p. 52, line 18). Detective Baran [sic] testified much earlier that "[t]here's some food allotment, but it's not that well defined," and then falsely elaborated that the allotment is limited to groceries. (GJT at p. 16, line 24).

A pastor's room and board is provided by the parish and this is accounted for in the Diocesan Policies. There is no restriction to be found in the use of credit cards to pay for a pastor's meals. Food is an allowable expense for operation of the rectory. (See *Attached C. Diocesan Policies* at p. 48, FIN - 26, Acct.

No. 7580). It is common practice for pastors to dine out on occasion. In addition, many if not most parishes provide a paid cook for the pastor. This was not provided for Fr. Riccitelli, who chose instead to frequently take his meals out. In such cases, the price of the meal is to be paid directly to the provider. (See *Attached D. Salary and Benefits for Incardinated Priests of the Diocese, VII (F)*). The savings to the parish by virtue of this arrangement were considerable. The lack of a cook and considerable grocery expenses along with Fr. Riccitelli's dining habits were well-known to the Finance Committee. Detective Baran [sic] admitted that the policy is not well-defined. This is the case, and the grand jurors should have been provided with the relevant guidelines in order to judge for themselves whether Fr. Riccitelli had exceeded his authority.

Similarly, the State accuses Dennis Riccitelli of illegally furnishing and renting several private homes by using parish funds and elicited testimony that he was not given permission to do so. (GJT at p. 22-27). The State admits that the residences in question were rented to the parish for housing visiting priests. In fact, no other use of the properties is alleged by the State. The residences were used as lodgings, effectively rectories, for visiting priests. Several account numbers in Diocesan Policy FIN - 26 are relevant in determining the propriety of using parish funds for these purposes. (See *Attached C. 7200 RENT, 7390 HOSPITALITY EXPENSES, 7530 SUPPLIES, CHURCH, RECTORY & HOUSEHOLD, and 7560*

FURNISHING AND EQUIPMENT). The Furnishing and Equipment account is especially applicable in determining the propriety of the alleged purchase of furnishings. It reads: "Purchase of small equipment and furniture costing less than \$2500 per item." This is an allowed expense.

The State also accuses Dennis Riccitelli of misusing church funds in order to pay for travel expenses. The State presented testimony that the trips in question were styled as pilgrimages, but that there was no discernable religious purpose to the trips. Apparently the State does not go so far as to allege that these trips were taken alone or only in the company of Ms. Kircher, though the inference could be drawn at several points in the presentation.

Det. Montana testified that priests are "not supposed to pay for any type of personal expense like pilgrimages with church funds." He admitted that he did not know if this was "specifically written." (GJT at p. 60, line 22). He also admitted that when such pilgrimages are set up through a travel agency, the priest usually is able to go free of charge. (GJT at p. 60, lines 5-13). It is then alleged by the prosecutor that \$39,205 in parish funds were used to pay for such expenses for Fr. Riccitelli and Esther Kircher. (GJT at p. 62, line 20). However, the Detective had to answer that he could not "specifically say that every dollar of that was used for (the two). . . ." (GJT at p. 63, line 1). He then testifies that various sums were transferred from several accounts (e.g., employee gifts account, HCC checking account) to the pilgrimage

account (GJT at pp. 63-66). The inference is that Fr. Riccitelli misused those funds. Yet, no guidelines relevant to the use of those accounts and transfers of funds were presented to the grand jury. The relevant Diocesan Policies should have been provided to the grand jurors.

Similarly, the State alleges that Fr. Riccitelli inappropriately used HCC funds to pay for Ms. Kircher's funeral expenses. The detective testified that this was an extraordinary occurrence, though in fact the parish had paid for several funerals in the past. (GJT at p. 67). He then testified that Fr. Riccitelli did not have permission from the Diocese to pay for the expense. The payment was made from the Priest's Discretionary Fund. Accordingly, Fr. Riccitelli did not need Diocesan permission for the discretionary expense. Diocesan Policy Finance - 26 Account No. 7780 PRIEST'S DISCRETIONARY FUND should have been read to the grand jurors for their determination of the propriety of this action. (*See Attached C.*)

III. CONCLUSION

Defendant Dennis Riccitelli has been denied a substantial procedural right by the State's presentation of false, incomplete, misleading and perjured testimony which infected the entire proceedings before the grand jury, as well as by the prosecutor's impermissible interference with relevant questioning by grand jurors and failure to present relevant canon

law and Diocesan Policies. Accordingly, Defendant Riccitelli respectfully requests that the Court dismiss the indictment in its entirety, or in the alternative, remand the case to the Grand Jury for a new determination of probable cause.

DATED this 14th day of May, 2007.

Kimerer & Derrick, P.C.

/s/ [Illegible]

Michael D. Kimerer

Kenneth F. Huls

Attorneys for Defendant

ORIGINAL of the foregoing filed
this 14th day of May, 2007, with:

Clerk of the Court
Maricopa County Superior Court
201 W. Jefferson
Phoenix, AZ 85003

COPY of the foregoing mailed
this 14th day of May, 2007, to:

The Honorable Silvia R. Arellano
Judge of the Maricopa County Superior Court
Southeast Judicial District – SEF 2C
222 E. Javelina Avenue
Mesa, AZ 85210

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301 W. Jefferson
Phoenix, AZ 85003
Attorney for Plaintiff
By /s/ M. Slusser

EXHIBIT A
HOLY CROSS
MESA
November 13, 2001

An internal control review was conducted at the parish as part of the standard seven-year cycle. Fr. Dennis Riccitelli was not available for this review, as he was in the hospital.

FINANCE COUNCIL

There is an active finance council in place. It consists of five members that have no defined terms. Three members are retirees in the parish. The other two members are Fr. Recitals and Bookkeeper, Tamara Duke. The council meets on a quarterly basis. The council does not participate in the preparation or review of an annual budget for the parish. The council does review income and expenses for the parish and approves expenditures that exceed \$20,000. Since May 1998, the finance council has met five times, based upon the meeting folders on file.

In the audit report from April 1997, it was recommended that the council take formal minutes of the meetings held. There are no formal minutes taken at the meetings. Meeting folders consists of monthly financial reports for the parish.

Recommendation:

Finance council should have terms, members should be appointed for three consecutive years with a maximum of one additional term. Paid staff must not be a member of the council. The Pastor and Bookkeeper, Tamara Duke, may serve as Ex-officio [sic], on the council. The council should be involved in establishing a budget for the parish with the Pastor. The finance council should review unbudgeted expenses. The council does not have authority to approve expenses of \$20,000 or more, only Bishop O'Brien has the authority to approve such expenses. The council must be consulted and it should be documented, prior to submitting the expense for the Bishop's approval.

Detailed minutes must be kept for each meeting held. Copies of the minutes need to be kept in the parish office as part of the permanent records of the church. The minutes would provide the necessary documentation that the council was consulted when the Bishop reviews requests for funds and project approval.

BANK ACCOUNTS

There are two bank accounts on deposit at Bank One. One general checking and one general savings. Fr. Riccitelli, Kathleen Knapp (Pastoral Assistant), and Mary Volk (Administrative Assistant). The parish also has a savings account on deposit at the Diocese. Bank statements are reconciled on a monthly basis by the bookkeeper and reviewed by Fr. Riccitelli. Funds on deposit at Bank One are within the Diocesan Guidelines of one additional month's operating expenses.

* * *

Internal Control Review
Holy Cross Parish, Mesa, Arizona
December 1-5, 2003

FINANCE COUNCIL

The Parish has a Finance Council that meets quarterly. Fr. Riccitelli said the Finance Council minutes did not consist of much. He simply keeps, in the Finance Council folder, the income statement and other items discussed. The council is usually provided an income statement, but not a balance sheet.

The members are currently Fr. Riccitelli, Tamara Duke (bookkeeper), Les Shane (retired veterinarian), Lloyd Larscheid (accountant/income tax preparer), and Ernie Chaladyn (retired, Fr. Riccitelli did not know his previous profession). Fr. Riccitelli told us he appointed these people because they are among the

parish's largest contributors. The members have been on the Council for several years. There are no apparent terms or member rotation.

Two members, Les Shane and Lloyd Larscheid, are also on the weekly count teams (Les is the lead count team member who empties the safe prior to the count). Their wives are also on the count teams.

A Happy Easter check for \$300 was written to Les & Terry Shane. Also, a check was written to Sharon Shane, their daughter-in-law, a PT day care employee, for \$2,000; it appeared to be a gift and was charged to charitable contributions on the general ledger.

Recommendations

Per Diocesan guidelines, the parish finance council has a responsibility to be good stewards, making recommendations concerning the use of resources compatible with the mission of the parish.

1. *The Finance Council should consist of at least five members, not counting the Pastor or Bookkeeper. The Pastor appoints the members with recommendations from the Parish Council.*
2. *The members should, ideally at a minimum, have some financial and business management background.*
3. *The Pastor and Bookkeeper should function as ex-officio (non-voting) members.*

4. *The council members should have terms of two or three years. No one member should serve more than two consecutive terms. (This was also noted in the 2001 Internal Control Review.)*
5. *At a parish the size of Holy Cross, the Finance Council should meet monthly.*
6. *The Finance Council should be supplied, at a minimum, an monthly income statement and balance sheet.*
7. *Detailed minutes, signed by the members, should be kept for all Finance Council meetings. They should be kept in a locked cabinet on site as part of the Parish's permanent records. (This was also stated in the 2001 Internal Control Review.)*
8. *The Pastor or parish should not give monetary or other substantial gifts to Finance Council members or their families.*

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EXHIBIT B

**Parish
Finance
Guide**

[Image Omitted In Printing]

Finance Department
Roman Catholic Diocese of Phoenix
400 E. Monroe
Phoenix, AZ 85004
(602) 257-0030

* * *

FIN-14

PARISH SPENDING LIMIT AND CONTRACTS

Current Limit

The parish-spending limit is \$20,000. Any parish expenditure in excess of that amount requires the approval of the Bishop.

Contracts

Due to our Corporation Sole status in the State of Arizona it is necessary to forward all contracts in excess of \$20,000 to the Diocesan Legal Council at the Diocesan Pastoral Center for review and authorized signature. This will help avoid any possible legal problems, should a contract be challenged in the courts.

Revised December 26, 2002

EXHIBIT C

FIN-26

CHART OF ACCOUNTS
REVISED August 30, 2001

ASSETS

990 (Header Account Number)

1000 GENERAL CHECKING

Main checking account maintained by the parish or entity.

1010 to 1050 SPECIAL CHECKING/SAVINGS ACCOUNTS

1060 PETTY CASH

Cash held at the parish or entity to take care of small expenditures that arise.

1070 INVESTMENT OTHER

Investments such as savings accounts, money market funds, etc. held by the parish or entity. Marketable securities are recorded to 1100.

1075 CCF ENDOWMENTS

1080 CHANCERY DEPOSITS

Funds on deposit with the Diocese. These would be considered savings accounts.

1100 MARKETABLE SECURITIES

Securities (stocks and bonds) received by the parish or entity. Items are to be recorded at market value the day the security was transferred to the parish or entity.

1280 ACCOUNTS RECEIVABLE

Money to be received for past transactions such as sale of goods or services, tuition, or rental of property or equipment.

1310 RESERVE FOR BAD DEBTS

An allowance set up to cover Accounts Receivable items that may be deemed to be uncollectable.

1450 INVENTORY

Inventories should be set up for items held for sale such as books, uniforms, candles, etc.

1500 PREPAID EXPENSES AND RECEIVABLE DEPOSITS

Payments made for items that relate to a future fiscal year, i.e., maintenance agreement that begins in one fiscal year and extends into the next would be charged proportionately to each fiscal year.

Revised December 26, 2002

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7030 SALARIES – INSTRUCTIONAL

Salaries of lay or religious personnel who serve as teachers, librarians, guidance counselors, coaches, substitutes, aides, etc.

7040 SALARIES – OTHER

Salaries of lay or religious personnel who serve as janitors, gardeners, cafeteria workers, bus drivers, etc.

7050 FICA TAXES

Employer portion of Social Security taxes levied on gross employee salary.

7060 RETIREMENT

Retirement benefit for all employees including payments made to the Priests Assurance Association and the Lay Employees Retirement Program or other Religious Order retirement programs.

7070 HEALTH INSURANCE EXPENSE

Premiums of health and life insurance coverage for employees. Employee payments for dependent coverage is charged to account 2260.

7080 LIVING ALLOWANCES

Payments made to religious or clergy staff members who do not reside in parish or entity owned housing.

7100 CONTRIBUTED SERVICES

The lay salary and payroll tax value of services performed by religious personnel minus the total salary and all benefits actually paid to the religious personnel. This computation merely provides the parish or entity information regarding the value of the service provided by the religious/clergy personnel. A like amount is recorded as income in account 6260 so the net effect of these entries on the operating statement is zero.

7110 EMPLOYEE GIFTS

Expenses incurred for employee recognition, special occasions, etc.

7200 RENT

All expenses for the rental of outside, non-parish facilities or equipment for educational, worship, and religious education meetings or activities.

7210 TELEPHONE

Expenses relating to telephone, telegram, answering machines or services. Reimbursements for personal use of telephone should be credited to this account.

7220 UTILITIES

Expenses for electric, gas, water and sewer services.

* * *

7390 HOSPITALITY EXPENSES

Expenses, including food, entertainment, lodging, etc., for guests of the parish or entity. Included would be dinner for the Bishop, Council members, committee members of the parish organizations, clergy invited for Communal Penance celebrations, appreciation dinners, etc.

7400 PUBLIC RELATIONS

Publicity expenses for the parish or entity but not including the weekly bulletin. Included would be open houses, eight grade visiting day at high schools, printing & mailing costs of brochures and pamphlets, student awards/treats, etc.

7410 PRINTING (CONTRACTED)

The cost of outside printing of Sunday envelopes [sic], calendars, newsletters, etc. Printing of letterhead and business envelopes would be charged to office supplies, account 7500.

7420 BULLETIN PRINTING

Expenses for the printing of Sunday bulletins.

7430 ADVERTISING

Expenses paid for the cost of advertisements in telephone directories, special community publications, yearbooks, etc. for advertisement value. Ads placed to support a charitable activity would be considered public relations and should be charged to account 7400.

7440 COMPUTER SERVICES

Expenses for computer services; i.e., bank accounting system, shared time in a computer programs.

7450 LEGAL SERVICE

Expenses for retainers and or fees for legal assistance.

7490 PROFESSIONAL SERVICES - OTHER

Expenses for payments to professionals, not part of the parish staff. Examples: retreat directors, instructors, consultants, parish mission facilitators, accountants, etc.

7500 SUPPLIES - OFFICE

Expenses for office supplies such as pens, paper, stationery (printing of letterhead is to be included), adding machine tape, bookkeeping journal sheets, certificates, computer supplies, etc.

7510 SUPPLIES - PRINTING

Expenses of maintaining and operating printing machines, copiers, and artist supplies.

7520 POSTAGE AND SHIPPING

Costs of mailing for parish functions such as letters, newsletters, monthly envelopes, payment of bulk mail fees, postage due, etc.

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7530 SUPPLIES – CHURCH, RECTORY & HOUSEHOLD

Costs of materials and supplies used by parish employees to maintain and care for buildings. Example: wax, soap, cleaning materials, mops, etc.

7540 BOOK PURCHASES

Costs of textbooks and materials used by students and staff or sold through the bookstore.

7545 SUPPLIES – STUDENT (Schools)

Miscellaneous classroom supplies used by students such as pencils, paper, etc.

7550 SUPPLIES – INSTRUCTIONAL

Supplies used in instruction including audio-visual material, testing materials, etc.

7560 FURNISHING AND EQUIPMENT

Purchase of small equipment and furniture costing less than \$2,500 per item.

7561 CAPITAL EXPENSE – BUILDING

Those expenditures that are over \$2,500, are not recorded in 7310 Building, Maintenance and Repair, add to the building structures of the current parish or facility. These amounts will be transferred to account 1910 (Asset – Building) at the end of the year, to increase the assets of the facility.

7562 CAPITAL EXPENSE – EQUIPMENT

Those expenditures that are over \$2,500, are not replacement costs, add to the equipment inventory of the facility. These amounts will be transferred to Accounts 1730 (Asset – Furniture & Fixtures), 1740 (Asset – Equipment – Office & Other), or 1750 (Asset – Automobile & Buses), at the end of the year, to increase those assets of the facility.

7570 UNIFORM PURCHASE

Purchase of uniforms for resale or sports uniforms.

7575 LITURGICAL WINE AND HOST EXPENSE

7576 VESTMENT EXPENSE

7577 LINEN EXPENSE

7580 FOOD

Purchase of food for cafeteria, rectory or convent operation.

7581 CAFETERIA & MEAL SERVICE SUPPLIES

Supplies used in the serving of meals; includes paper cups, plates, napkins, forks, tablecloths, etc.

7590 MISCELLANEOUS SUPPLIES

Debits to this account are supplies not covered in other supply categories.

7700 to 7760 PROGRAMS

Expenses of special programs that the entity wishes to report individually. Included could be infant baptism, retreats, Adopt-a-Student, Sunday donuts, Clown Ministry, etc.

7770 DONATIONS

Monies paid out by the parish to other nonprofit, fraternal, charitable organizations, in support of their activities. The main purpose of the activity is charity, not resulting in advertising that the parish may receive.

7780 PRIEST'S DISCRETIONARY FUND

Funds provided to resident clergy to use for expenses incurred in matters of the internal forum. Such items are marriage cases, dispensations, aid to the needy and destitute and which are not a matter of public record.

7850 FINANCIAL AID

Awards for tuition aid, scholastic achievement, work service, etc.

7870 DEBT REDUCTION (Principal)

All Monies budgeted for the reduction of principal of the parish debt. (Clear to Loan Payable Account at fiscal year end.)

7880 INTEREST

Expenditures representing the cost of borrowing funds in connection with the parish, such as capital improvement loan, or the purchase of equipment on a contract.

7890 BANK FEES

Fees charged by the bank such as monthly service charges, returned deposit items and insufficient funds charges.

7900 DIOCESAN ASSESSMENT

The assessment tax for each parish of the Diocese to support and maintain the Office of the Bishop, Chancery Office, Marriage Tribunal, Diocesan Schools, and other Diocesan agencies.

7905 PRIEST ASSURANCE ASSOCIATION

7910 DEACON ASSESSMENT

7930 DIOCESAN NEWSPAPER (CATHOLIC SUN)

The quarterly charge to the parish for the delivery of The Catholic Sun to its parishioners.

* * *

EXHIBIT D
SALARY AND BENEFITS
FOR INCARDINATED PRIESTS
OF THE DIOCESE

Effective July 1, 2003

I. SALARY

- A. The base salary (newly ordained) is \$1175 per month. In addition, there is a \$10 per month increase given each July for each year of service since ordination.

For example	Base Salary	Increase	Total Salary
Newly Ordained	\$1,175	\$0	\$1,175
1 year ordained	\$1,175	\$10	\$1,185
5 years ordained	\$1,175	\$50	\$1,225
10 years ordained	\$1,175	\$100	\$1,275
15 years ordained	\$1,175	\$150	\$1,325
20 years ordained	\$1,175	\$200	\$1,375
25 years ordained	\$1,175	\$250	\$1,425
30 years ordained	\$1,175	\$300	\$1,475

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35 years ordained	\$1,175	\$350	\$1,525
40 years ordained	\$1,175	\$400	\$1,575
45 years ordained	\$1,175	\$450	\$1,625

- B. Pastors, Diocesan Directors and priests working in the Diocesan Center receive an additional \$150 per month compensation.
- C. Mass stipends are retained by the priest. All other stole [sic] fees are retained by the parish.

II. RETIREMENT

- A. For diocesan priests involved in parish ministry, there is a diocesan assessment to the parish, currently 1% of ordinary income, for the Priests Assurance Association (P.A.A.).
- B. For priests involved in special ministry, the assessment is \$2,000 per year, and is the responsibility of the hiring institution.
- C. Each priest is eligible to begin receiving retirement benefits from the Priests Assurance Association at age 65. The current retirement benefit for a priest, legally retired, at age 65 is computed in the following way: For each year of service as an incardinated priest of this Diocese, the priest receives \$48 per

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month retirement benefit. The maximum benefit at age 65 for a priest with 35 or more years of service is 35 times \$48 or \$1,680 per month. A priest may postpone taking his pension at

* * *

- F. If room and board costs are not provided by the parish or employing agency, the negotiated allowance for room and board should be paid directly to the provider of those services. Allowances should not be paid to the priests. This should be treated as a regular cash disbursement so that no reporting or withholdings are required for these amounts, and so the priest does not need to report as income.

* * *

APPENDIX F

**ANDREW P. THOMAS
MARICOPA COUNTY ATTORNEY**

Attorneys for Plaintiff:
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Sarah Silvester
State Bar No. 023462
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Telephone: (602) 506-1131
Attorney for Plaintiff

**IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA**

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,
Plaintiff,
v.

DENNIS RICCITELLI,
Defendant.

Maricopa County
Superior Court
No. CR 2004-043921-001 SE

STATE'S MOTION FOR
CLARIFICATION OF
ORDER REQUIRING THE
STATE TO INSTRUCT
GRAND JURY ON CANON
LAW AND DIOCESAN
POLICY AND PROCEDURE

(Assigned to the Honorable
Silvia R. Arrellano)

(Filed May 5, 2008)

The State of Arizona, by and through undersigned counsel, asks this Court to clarify its July 6, 2007, order remand this case to the grand jury and ordering the State to instruct the grand jurors on canon law and Diocesan policy and procedure.

A. Procedural History

The defendant was indicted on December 14, 2004, for one count of theft, a class 2 felony, eight counts of theft, class 3 felonies, one count of theft, a class 5 felony, and four counts of fraudulent schemes and artifices, class 2 felonies. The indictment alleged that these offenses were committed between January 1, 2001, and December 31, 2003, when the defendant, who is an ordained priest of the Roman Catholic Church, was the pastor of the Holy Cross Catholic Church. The defendant filed a Motion to Remand for New Determination of Probable Cause on February 4, 2005, and requested an extension of forty-five days to file a substantive motion. On February 8, 2005, this Court granted the defendant's request for an extension "to supplement the motion as needed." More than twenty-seven months later, on May 14, 2007, the defendant filed a Motion to Dismiss Indictment or in the Alternative to Remand for a New Determination of Probable Cause. The State filed a written response to the motion. On July 6, 2007, this Court remanded the matter to the grand jury for a new determination of probable cause, and ordered, *inter alia*, that the State instruct the grand jury on canon law and Diocesan policy and procedure.

The defendant filed a Motion to Dismiss on August 3, 2007, arguing that the case should be dismissed based upon the State's failure to file an indictment or complaint or commence grand jury proceedings within fifteen days of this Court's order remanding the case. The State filed a written objection to the defendant's motion. On August 21, 2007, this Court denied the motion to dismiss.

The State filed a petition for special action regarding this Court's order that the grand jury be instructed on canon law and Diocesan policy and procedure. In that special action, the State asserted that it was not required to instruct the grand jury on canon law and Diocesan policy and procedure and, furthermore, that such information does not constitute clearly exculpatory evidence. The Court of Appeals declined to accept jurisdiction, and the Arizona Supreme Court subsequently denied the State's petition for review on the issue.

The State now asks this Court to clarify its July 6, 2007, order. The current order violates the Establishment Clause of the First Amendment by creating special rights or defenses which have no secular purpose and which entangle church doctrine and policy with grand jury instructions. In addition, the order violates the Equal Protection Clause of the Fourteenth Amendment by giving special rights or defenses to the defendant based upon his religious affiliation.

B. Argument

1. **The Establishment Clause of the First Amendment prohibits government action which does not have a secular purpose and which is excessively entangled with religion. Because the defendant is a priest and worked for the victim church, this Court ordered the State to go beyond Arizona law and also instruct the grand jury on canon law and Diocesan policy and procedure. This Court's order had no secular purpose and violated the Establishment Clause by entangling church doctrine and policy with the required grand jury instructions.**

The First Amendment of the United States Constitution provides, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." This prohibition applies to states through the Fourteenth Amendment. *King v. Richmond County, Georgia*, 331 F.3d 1271, 1275 (11th Cir. 2003). "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" *Everson v. Board of Ed. of Ewing Township*, 330 U.S. 1, 16 (1947), quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

According to the United States Supreme Court, a governmental practice violates the Establishment Clause if: (1) it does not have a secular purpose;

(2) its primary effect is to advance or inhibit religion; or (3) it fosters excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984). State action violates the Establishment Clause if it falls within any of these prongs. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). Furthermore, state action need not take the form of a statute to bring about constitutional scrutiny. "State acts may be legislative, administrative, or judicial; so long as they use state resources in a manner offensive to the Constitution, federal courts may act." *American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc.*, 510 F.Supp. 886, 890 (D.C. Ga. 1981).

This Court's order violates the Establishment Clause because there is no secular purpose for requiring the State to instruct the grand jury on canon law and Diocesan policy and procedure. The primary function of the grand jury is to determine whether probable cause exists to believe that a crime has been committed and that the individual being investigated was the one who committed it. *See State v. Baumann*, 125 Ariz. 404, 408, 610 P.2d 38, 42 (1980). In presenting a case to the grand jury, the State must instruct the panel on the relevant statutes. *See Crimmins v. Superior Court*, 137 Ariz. 39, 43, 668 P.2d 882, 886 (1983) (Instruction on all relevant statutes satisfies due process.) It is undisputed that canon law and church policy do not fall under the category of the laws of Arizona of which the State must instruct the grand jury.

The State is also required to present any clearly exculpatory evidence to the grand jury. *State v. Coconino County Superior Court*, 139 Ariz. 422, 678 P.2d 1386 (1984). Clearly exculpatory evidence is evidence of such weight that it might deter the grand jury from finding probable cause. *Trebus v. Davis In and For County of Pima*, 189 Ariz. 621, 625, 944 P.2d 1235, 1239 (1997). Because the grand jury's function is to determine whether probable cause exists, and not to determine guilt, the State is not required to present all potentially exculpatory evidence. *Franzi v. Superior Court in and for Pima County*, 139 Ariz. 556, 565-66 679 P.2d 1043, 1052-53 (1984); *Coconino County Superior Court*; *supra*; *Baumann, supra*.

This Court's previous order did not find, nor does the evidence show, that canon law and church policy are clearly exculpatory in this case. Canon law and Diocesan policy establish for pastors and parish administrators certain rights, duties, and obligations to the Catholic Church. (Exhibit A, Affidavit by Very Rev. Christopher J. Fraser, JCL, at page 1, ¶ 3.) Contrary to the defendant's contention, "the pastor of a parish does not have unlimited discretion over parish finances, nor does he have the authority to spend the economic resources of a parish in a way that could potentially put the patrimony of the parish at risk." (*Id.* at page 2, ¶ 5.) Canons 1281-1289 specify the rules governing the administration of goods to which all pastors are bound, while other canons address the behavior of clergy and restrict certain activities such as the ability to engage in private

business. (*Id.* at page 1-2, ¶ 4.) Applying the standard set forth by the Arizona Supreme Court in *Trebus, supra*, even if the grand jury were instructed on canon law and Diocesan policy and procedure, it would not have been of such exculpatory weight as to have deterred it from finding that probable cause existed that the defendant committed the offenses. Therefore, as canon law and church policy are neither state law nor clearly exculpatory evidence, there is no secular purpose for ordering the State to provide the information to the grand jury. *Cf. People v. Campobello*, 810 N.E.2d 307, 317 (Ill. App. 2004) (State subpoena for church records related to criminal investigation of a priest served a secular purpose, even though the church may violate canon law by releasing the information.)

By ordering the State to instruct on church doctrine and policies, this Court also violated the Establishment Clause by causing the laws of Arizona to become excessively entangled with religion. Excessive entanglement has been defined as an "impermissible merging or intermeddling of the proper spheres of religion and government." *American Civil Liberties Union of Georgia*, 510 F.Supp at 892; see J. Madison, The Memorial and Remonstrance Against Religious Assessments P 11, reproduced in *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 719-27 (1970) (appendix to opinion of Douglas, J., dissenting), and quoted in *Lemon*, 403 U.S. at 633-34.

"Since at least the turn of the century, courts have declined to 'interfere [] with ecclesiastical

hierarchies, church administration, and appointment of clergy.’” *Rweyemamu v. Cote*, 2008 WL 746822 (2nd Cir. 2008), quoting *Minker v. Balt. Annual Conference of the United Methodist Church*, 894 F.2d 1354, 1357 (D.C. Cir. 1990). It is not the role of secular courts to resolve issues that require the interpretation of religious doctrine. *Ran-Dav’s County Kosher, Inc. v. State*, 608 A.2d 1353, 1374 (N.J. 1992) (A law which regulated kosher foods and required the state to interpret kosher laws violated the Establishment Clause as excessively entangled religion with government action.) Furthermore, taking legal sides in a religious dispute violates the Establishment Clause as it leads to excessive entanglement of government action with religion. See *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1038 (7th Cir. 2006) (“A suit to remove a priest on the ground that he is a heretic, or to reinstate a parishioner who has been excommunicated, . . . has never been justiciable in the federal courts.”); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1304 (11th Cir. 2000) (The Establishment Clause mandates that churches retain exclusive control over strictly ecclesiastical matters. Investigation into church’s view of whether individual was suited for a particular clergy position excessively entangled government and religion of the church.)

However, secular legal action does not violate the Establishment Clause in disputes between a church and clergy where the issue does not involve questions of ecclesiastical doctrine or belief. *Dobrota v. Free*

Serbian Orthodox Church St. Nicholas, 191 Ariz. 120, 126, 952 P.2d 1190, 1196 (App. 1998) (Legal action between church and clergy did not cause excessive entanglement as the issue revolved solely around the calculation of money damages arising from a breach of contract.) Even in a criminal case where, as here, a defendant raises religious laws as a defense, the Establishment Clause is not violated where the finder of fact is not required to interpret church doctrine. *State of North Dakota v. Burckhard*, 579 N.W.2d 194, 195 (N.D. 1998). In *Burckhard*, the defendant was a priest charged with theft of church property, and claimed that he had authority under canon law to spend the church's money for his personal purposes that were entirely unrelated to the church's business. *Id.* The trial court granted the defendant's motion to dismiss the complaint against him on the basis that the case excessively entangled religion with state action. *Id.* The North Dakota Supreme Court vacated the dismissal, stating:

We are not convinced prosecution of these charges requires the court to interpret or review church doctrine, policy, or laws. As in any theft case involving allegations the defendant misused funds entrusted to him, the State will need to produce evidence, through testimony of church officials or other appropriate means, of the authority entrusted to the defendant and conduct outside that authority. It is for the factfinder to decide whether the defendant made unauthorized expenditures of church funds. The mere fact

that a church official's wrongful conduct may violate church policy or canon law in no way precludes the same conduct from also violating and being prosecuted under secular criminal laws.

Id. at 201.

Although here the State charged the defendant with solely secular crimes against the victim-church, this Court interjected religious doctrine into the proceedings by ordering the State to instruct the grand jury on canon law and Diocesan policy. Whether or not the defendant's actions could be justified before a church tribunal under canon law is a separate and distinct issue from whether he violated the laws of Arizona. Canon 1344 acknowledges the legitimacy of the separate secular legal system. (Exhibit A at page 2, ¶ 4.) This Court, however, caused the defendant's religion and state action to become excessively entangled, as it required the grand jury to define the defendant's authority over church funds based upon its interpretation of canon law. The State asks this Court to recognize the secular nature of the grand jury proceedings, and requests this Court to clarify its order so as not to entangle religious doctrine with legal rules and procedure.

2. **The Equal Protection Clause of the Fourteenth Amendment prohibits, *inter alia*, denying citizens equal protection under the law. The State is required to instruct the grand jury of all applicable provisions of Arizona law. However, because the defendant is a priest and worked for the victim church, this Court ordered the State to also instruct the grand jury on both canon law and Diocesan policy and procedure. The State has not been ordered to instruct the grand jury of church doctrine and policy when non-clergy defendants were charged with offenses against a church. This Court's order violates the Equal Protection Clause because it provides the defendant with special rights and criminal defenses based upon his religious affiliation.**

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution prohibits, *inter alia*, denying citizens equal protection under the law. "That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court." *Shelly v. Kraemer*, 334 U.S. 1, 14 (1948). The United States Supreme Court has recognized that, "[S]tate action in violation of the Amendment's provisions is equally repugnant to the constitutional commands whether directed by state statute or taken by a

judicial official in the absence of statute." *Id.* at 15. In addition, the United States Supreme Court has recognized how the apparent state sanction of one religion over all others can cause violence and political divergence. *Engel v. Vitale*, 370 U.S. 421, 429 (1962) (Court provided historical overview of the Establishment Clause in holding that state school prayer program, which incorporated particular religious beliefs, violated the First and Fourteenth Amendments); *Everson*, 330 U.S. 1, 11-13 (1947) (Court provided historical overview of need to separate church and state in holding that state transportation for both public and parochial school students did not violate the First and Fourteenth Amendments). To pass Equal Protection scrutiny, State action which treats groups of people differently must be shown to bear a rational relationship to a permissible state objective. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *McGowan v. Maryland*, 366 U.S. 420, 425 (1961).

The permissible state objective in overseeing the grand jury process is to insure that defendants are afforded due process and that people are held accountable for their actions. Due to the very nature of the grand jury, defendants are not entitled to all of the protections that are afforded defendants in jury trials. *O'Meara v. Gottsfeld*, *supra* at 578, 851 P.2d at 1377. This Court's order that the State instruct the grand jury on canon law and Diocesan policy and procedure clearly treats the defendant differently from others who have been charged with crimes

against the church. In essence, the order has provided the defendant with special rights and criminal defenses based upon his religious affiliation. The order bears no rational relationship to the permissible state objective, and therefore violates the Equal Protection Clause.

C. Conclusion

For all the reasons stated in this Motion, the State requests that this Court reconsider and clarify its prior order requiring the State to instruct the grand jury on both canon law and Diocesan policy and procedure.

Submitted May 5th, 2008.

ANDREW P. THOMAS
MARICOPA COUNTY ATTORNEY

BY /s/ Elizabeth Ortiz
Elizabeth Burton Ortiz
Deputy County Attorney

Copy of the foregoing
mailed\delivered this
5th day of May, 2008,
to:

The Honorable Silvia R. Arrellano
Judge of the Superior Court

Kenneth Huls
Kimerer & Derrick, P.C.
221 East Indianola Avenue
Phoenix, Arizona 85012
Attorney for Defendant

BY /s/ Elizabeth Ortiz
Elizabeth Burton Ortiz
Deputy County Attorney

STATE'S EXHIBIT A

AFFIDAVIT

I, Reverend Christopher J. Fraser, do hereby certify that the following information is true and correct to the best of my knowledge, information and belief:

1. I am the Judicial Vicar of the Roman Catholic Church of the Diocese of Phoenix (the "Diocese"). In accord with canon 1420 of the Revised Code of Canon Law, the Bishop of the Diocese and I constitute one single tribunal, or one ecclesiastical court, in which cases are judged in the Diocese. Among other things, I assist the Bishop in his pastoral office by presiding over the Diocesan Tribunal and by conducting judicial business therein. Since a diocesan bishop rarely carries out his judiciary duties personally, he fulfills these obligations vicariously through the Judicial Vicar, whom he appoints. I serve as a Judge in marriage nullity cases, and I am a consultant to the Bishop on canonical issues as they arise.

2. My training and education include a Bachelor of Science degree in Business from Arizona State University, a Master's of Divinity Degree from St. Meinrad School of Theology, and a Licentiate in Canon Law from The Catholic University of America. I was ordained a Catholic priest in 2001 and have ministered in four parishes in the Diocese since then. I have served as a canon lawyer in the Diocese since 2006, and I have served either as Adjutant Judicial Vicar or Judicial Vicar for over a year and a half.

3. The body of law which organizes and regulates the life of the Catholic Church throughout the world is known as canon law. These laws, known as "canons" establish for pastors and administrators of parishes certain rights, duties, and obligations. For example, canon 532 specifies that the pastor of a parish is the administrator of its goods and represents it in all of its juridic affairs; e.g., money, property, and assets. Furthermore, canon 1284 explains that pastors are to administrate their parishes in such a way that they are personally "bound to fulfill their function with the diligence of a good householder." In doing so, canon 1284 goes on to state that pastors are to "observe the prescripts of both canon law and civil law or those imposed by a founder, a donor, or a legitimate authority, and especially be on guard so that no damages comes to the Church from the non-observance of civil law." As the representative of the juridic person of the parish, a pastor is bound to adhere to the canon law of the Church for the lawful administration of Church money and property

in accord with canons 1281-1288. Thus, despite having wide discretion in his administration of a parish, a pastor's decision making will always be exercised within certain parameters and within the context of some required consultation with his parishioners. Two primary consultative bodies for a pastor are the parish finance council and the pastoral council.

4 Canon law does not give a priest or pastor the unfettered right to spend church or parish money in any way that he sees fit. Canons 1281-1289 specify the laws governing the administration of goods to which all pastors are bound. Furthermore, canon 282, and canons 285-286, set out in some detail the expectation that clergy will conduct themselves both privately and publicly in a manner commensurate with the dignity of the Catholic priesthood. The directives found in these canons address the lifestyle and behavior of clergy, and restrict certain public activities, including the ability of priests to engage in private business, and prevent others, including the ability of a priest to exercise the power of political office. Finally, it is worth noting that canon 1344 anticipates the possibility of taking into consideration the punishment of a cleric by the civil law authorities in carrying out the Church's own legal sanctions. In these cases, the ecclesial judge could defer or alter a penalty, depending upon whether or not justice had been served by the carrying out of the civil or secular sanction. This acknowledgement of civil law illustrates the fact that canon law deems civil law

legitimate and seeks to cooperate with the laws of a society to the extent that they do not conflict with divine law or canon law.

5 As stated above, the pastor of a parish does not have unlimited discretion over parish finances, nor does he have the authority to spend the economic resources of a parish in a way that could potentially put the patrimony of the parish at risk. Canon 537 requires a pastor to have a parish finance council with whom he is required to consult on occasion. This consultative body assists the pastor in his administrative duties by providing support and counsel on financial matters in the parish. These would include financial planning, building projects, and the annual parish budget. The requirement for a parish to have a finance council is reemphasized by the fact that canon 1280 requires that all public juridic persons in the Church have a finance council. The parish is one such public juridic person; and therefore is required to establish a finance council with which the pastor should consult regarding the administration of the parish's temporal goods.

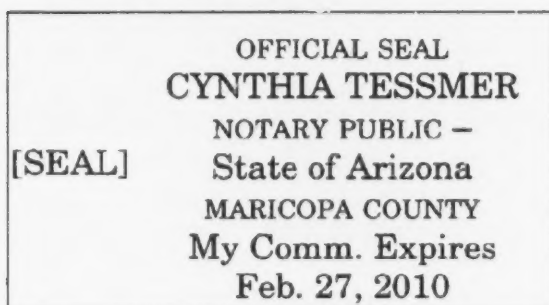
6. The fact that canon law gives a pastor significant authority over a parish and entrusts him with discretion in decision making does not mean that a pastor can subvert the civil or criminal laws regarding fraud, theft, or other criminal activity. As seen in this short summary, canon law seeks to cooperate with the laws of society. Moreover, in addition to secular law, the Catholic Church has its own

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set of laws in the form of canon law to which pastors
and the Catholic faithful must adhere.

/s/ Very Rev. Christopher J. Fraser, JCL 4/18/08
Very Rev. Christopher J. Fraser, JCL DATE

SUBSCRIBED AND SWORN TO before me 18
day of April, 2008.



/s/ Cynthia Tessmer
Notary Public

My Commission Expires: 2-27-2010

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APPENDIX G

**ANDREW P. THOMAS
MARICOPA COUNTY ATTORNEY**

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Attorneys for Petitioner

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA
ex rel. ANDREW P.
THOMAS, Maricopa
County Attorney,
Petitioner,

v.

THE HONORABLE
SILVIA R. ARELLANO, a
Judge of the SUPERIOR
COURT OF THE STATE
OF ARIZONA, in and for
the County of MARICOPA,
Respondent,

DENNIS RICCITELLI,
Real Party in Interest.

Court of Appeals
No. 1 CA-SA
Maricopa County
Superior Court No.
CR 2004-043921-001 SE

PETITION FOR
SPECIAL ACTION
ORAL ARGUMENT
REQUESTED

(Filed Jul. 18, 2008)

Petitioner, the State of Arizona, asks this Court to reverse the Respondent Judge's order of May 19, 2008, which denied the State's motion for clarification of the July 6, 2007, order remanding this case and requiring the State to instruct the grand jurors on canon law and Diocesan policy and procedure.

The State respectfully requests this Court to set this matter for oral argument.

SUBMITTED this 18th day of July, 2008.

ANDREW P. THOMAS
MARICOPA COUNTY
ATTORNEY

By /s/ Elizabeth Ortiz
Elizabeth Burton Ortiz
Deputy County Attorney

I. Jurisdictional Statement

This Court has jurisdiction to consider this petition for special action under Article 6, §§ 5 and 9 of the Constitution of Arizona, A.R.S. §§ 12-2021 *et seq.*, and Rules 1, 3, 4, and 7, Arizona Rules of Procedure for Special Actions.

Special action review is discretionary. This Court will ordinarily exercise its discretion and grant special action review when the issue raised is a pure question of law with undisputed facts and the issue is likely to arise again. *See generally State v. Kearney*, 206 Ariz. 547, 548, 81 P.3d 338, 339 (App. 2003); *Raney v. Lindberg*, 206 Ariz. 193, 196, 76 P.3d 867,

870 (App. 2003); *State ex rel. Romley v. Rayes*, 206 Ariz. 58, 60, 75 P.3d 148, 150 (App. 2003); *State ex rel. Hance v. Arizona Bd. of Pardons and Paroles*, 178 Ariz. 591, 595, 875 P.2d 824, 828 (App. 1993). "Special action relief is reserved for those instances where there is no other equally plain, speedy or adequate remedy and is appropriately granted on pure questions of law where the issue is a matter of first impression and of statewide importance." *State ex rel. Miller v. Superior Court*, 189 Ariz. 228, 230, 941 P.2d 240, 242 (App. 1997). See also *State ex rel. Collins v. Superior Court*, 129 Ariz. 156, 159, 629 P.2d 992, 995 (1981); *State ex rel. Hyder v. Superior Court*, 114 Ariz. 337, 339, 560 P.2d 1244, 1246 (1977).

This case meets the criteria for special action jurisdiction for several reasons. First, this is an issue of first impression which presents the purely legal question of whether the trial court's order that the State instruct the grand jury on canon law and Diocesan policy and procedure violates the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. In addition, this issue is likely to arise again in cases where either the defendant is associated with a church or the victim itself is a church.

Most importantly, special action jurisdiction is appropriate because the State has no equally plain, speedy, or adequate remedy by appeal. This case has been remanded for a new probable cause determination. This special action is the only opportunity the State has to seek review of the Respondent Judge's

July 6, 2007, and May 19, 2008, orders that it instruct the grand jury on canon law and Diocesan policy and procedure. Once the case has returned to the grand jury, the State will have no choice but to follow the Respondent Judge's orders.

Therefore, the State requests this Court to accept jurisdiction, grant relief, and issue an Opinion settling this issue for the guidance of the Arizona bench and bar.

II. Standard of Review

The standard of review is whether the Respondent Judge acted arbitrarily or capriciously, abused her discretion, or acted outside her legal authority, based on the record in this case, in denying the State's motion for clarification, thereby affirming the July 6, 2007, order that the State instruct the grand jury on canon law and Diocesan policy and procedure.

III. Statement of the Issue

Did the Respondent Judge's July 6, 2007, and May 18, 2008, orders that the State instruct the grand jury on canon law and Diocesan policy and procedure violate the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment?

IV. Statement of the Facts and Procedural Background

The Real Party in Interest, defendant Dennis Riccitelli ["the defendant"], was indicted on December 21, 2004, for one count of theft, a class 2 felony, eight counts of theft, class 3 felonies, one count of theft, a class 5 felony, and four counts of fraudulent schemes and artifices, class 2 felonies. (State's Appendix A.) The indictment alleged that these offenses were committed between January 1, 2001, and December 31, 2003, when the defendant, who is an ordained priest of the Roman Catholic Church, was the pastor of the Holy Cross Catholic Church. (*Id.*) The defendant filed a Motion to Remand for New Determination of Probable Cause on February 4, 2005, and requested an extension of forty-five days to file a substantive motion. (State's Appendix B.) On February 8, 2005, the trial court granted the defendant's request for an extension "to supplement the motion as needed." (State's Appendix C at page 3.)

More than twenty-seven months later, on May 14, 2007, the defendant filed a Motion to Dismiss Indictment or in the Alternative to Remand for a New Determination of Probable Cause. (State's Appendix D.) In his motion to remand, the defendant asserted that the State was required to instruct the grand jury on canon law and the policy and procedures of the Diocesan. (*Id.*) In particular, the defendant contended that:

Canon law is the ecclesiastical *law* of the Roman Catholic Church. It is the foundation

of a fully developed legal system with its own courts, judges and lawyers. Canon law is a legal specialty and its practitioners acquire specialized and advanced degrees in its study and interpretation.

(*Id.* at page 18; emphasis in original.) The defendant further opined that:

The Roman Catholic Church views itself as a complete society and therefore maintains the inherent right to govern itself according to its own laws and procedures, including those concerning the administration of goods.

(*Id.* at 13.) The State filed a written response to the motion. (State's Appendix E.)

On July 6, 2007, the Respondent Judge remanded the matter to the grand jury for a new determination of probable cause, and ordered, *inter alia*, that the State instruct the grand jury on canon law and Diocesan policy and procedure. (State's Appendix F.) Specifically, the Respondent Judge found that:

[The] State failed to instruct the grand jurors on [canon] Law and Diocesan Policy and Procedure. The relevance of the evidence is clear; the grand jurors were required to make a determination of whether [the defendant's] conduct exceeded the authority granted him by church policies and law, and if so, did [the defendant's] conduct violate Arizona law. Church law and policies are directly relevant in determining whether [the defendant] committed the crimes he is

charged with, that is, whether [the defendant] exceeded his authority in dealing with church financial matters.

(State's Appendix F at 2.)

The defendant filed a Motion to Dismiss on August 2, 2007, which argued that the case should be dismissed based upon the State's failure to file an indictment or complaint or commence grand jury proceedings within fifteen days of the Respondent's Judge's order remanding the case. (State's Appendix G.) The State filed a written objection to the defendant's motion. (State's Appendix H.) On August 21, 2007, the Respondent Judge denied the motion to dismiss. (State's Appendix I.)

The State filed a special action in which it asserted that, because canon law and the Diocese's policy and procedure are neither secular law nor clearly exculpatory evidence, the State is not required to present the information to the grand jury. (State's Appendix J.) After this Court declined jurisdiction, the Arizona Supreme Court denied the State's petition for review. (State's Appendix K.)

The State then filed a motion for clarification with the trial court in which it asked that the July 6, 2007, order requiring the State to present the information to the grand jury be clarified so that it did not violate either the First or Fourteenth Amendments to the United States Constitution. (State's Appendix L.) The Respondent Judge denied the motion on May 19, 2008. (State's Appendix M.)

V. Argument

- 1. The Establishment Clause of the First Amendment prohibits government action which does not have a secular purpose and which is excessively entangled with religion. Because the defendant is a priest and worked for the victim church, the Respondent Judge ordered the State to go beyond Arizona law and also instruct the grand jury on canon law and Diocesan policy and procedure. The Respondent Judge's order had no secular purpose and violated the Establishment Clause by entangling church doctrine and policy with the required grand jury instructions.**

The First Amendment of the United States Constitution provides, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" This prohibition applies to states through the Fourteenth Amendment. *King v. Richmond County, Georgia*, 331 F.3d 1271, 1275 (11th Cir. 2003). "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" *Everson v. Board of Ed. of Ewing Township*, 330 U.S. 1, 16 (1947), quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

According to the United States Supreme Court, a governmental practice violates the Establishment

Clause if: (1) it does not have a secular purpose; (2) its primary effect is to advance or inhibit religion; or (3) it fosters excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984). State action violates the Establishment Clause if it falls within any of these prongs. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). Furthermore, state action need not take the form of a statute to bring about constitutional scrutiny. "State acts may be legislative, administrative, or judicial; so long as they use state resources in a manner offensive to the Constitution, federal courts may act." *American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc.*, 510 F.Supp. 886, 890 (D.C. Ga. 1981).

The Respondent Judge's order violates the Establishment Clause because there is no secular purpose for requiring the State to instruct the grand jury on canon law and diocesan policy and procedure. The primary function of the grand jury is to determine whether probable cause exists to believe that a crime has been committed and that the individual being investigated was the one who committed it. See *State v. Baumann*, 125 Ariz. 404, 408, 610 P.2d 38, 42 (1980). In presenting a case to the grand jury, the State must instruct the panel on the relevant statutes. See *Crimmins v. Superior Court*, 137 Ariz. 39, 43, 668 P.2d 882, 886 (1983) (Instruction on all relevant statutes satisfies due process.) It is undisputed that canon law and church policy do not fall under

the category of the laws of Arizona of which the State must instruct the grand jury.

The State is also required to present any clearly exculpatory evidence to the grand jury. *State v. Coconino County Superior Court*, 139 Ariz. 422, 678 P.2d 1386 (1984). Clearly exculpatory evidence is evidence of such weight that it might deter the grand jury from finding probable cause. *Trebus v. Davis In and For County of Pima*, 189 Ariz. 621, 625, 944 P.2d 1235, 1239 (1997). Because the grand jury's function is to determine whether probable cause exists, and not to determine guilt, the State is not required to present all potentially exculpatory evidence. *Franz v. Superior Court in and for Pima County*, 139 Ariz. 556, 565-66 679 P.2d 1043, 1052-53 (1984); *Coconino County Superior Court*; *supra*; *Baumann, supra*.

The Respondent Judge's July 6, 2007, order did not find, nor does the evidence show, that canon law and church policy are clearly exculpatory in this case. Canon law and Diocesan policy establish for pastors and parish administrators certain rights, duties, and obligations to the Catholic Church. (State's Appendix L at Exhibit A, page 1, ¶ 3.) Contrary to the defendant's contention, "the pastor of a parish does not have unlimited discretion over parish finances, nor does he have the authority to spend the economic resources of a parish in a way that could potentially put the patrimony of the parish at risk." (*Id.* at page 2, ¶ 5.) Canons 1281-1289 specify the rules governing the administration of goods to which all pastors are bound, while other canons address the behavior of

clergy and restrict certain activities such as the ability to engage in private business. (*Id.* at page 1-2, ¶ 4.) Applying the standard set forth by the Arizona Supreme Court in *Trebus, supra*, even if the grand jury were instructed on canon law and Diocesan policy and procedure, it would not have been of such exculpatory weight as to have deterred it from finding that probable cause existed that the defendant committed the offenses. Therefore, as canon law and church policy are neither state law nor clearly exculpatory evidence, there is no secular purpose for ordering the State to provide the information to the grand jury. *Cf. People v. Campobello*, 810 N.E.2d 307, 317 (Ill. App. 2004) (State subpoena for church records related to criminal investigation of a priest served a secular purpose, even though the church may violate canon law by releasing the information.)

By ordering the State to instruct on church doctrine and policies, the Respondent Judge also violated the Establishment Clause by causing the laws of Arizona to become excessively entangled with religion. Excessive entanglement has been defined as an "impermissible merging or intermeddling of the proper spheres of religion and government." *American Civil Liberties Union of Georgia*, 510 F.Supp at 892; see J. Madison, The Memorial and Remonstrance Against Religious Assessments P 11, reproduced in *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 719-27 (1970) (appendix to opinion of Douglas, J., dissenting), and quoted in *Lemon*, 403 U.S. at 633-34.

"Since at least the turn of the century, courts have declined to 'interfere [] with ecclesiastical hierarchies, church administration, and appointment of clergy.'" *Rweyemamu v. Cote*, 2008 WL 746822 (2nd Cir. 2008), quoting *Minker v. Balt. Annual Conference of the United Methodist Church*, 894 F.2d 1354, 1357 (D.C. Cir. 1990). It is not the role of secular courts to resolve issues that require the interpretation of religious doctrine. *Ran-Dav's County Kosher, Inc. v. State*, 608 A.2d 1353, 1374 (N.J. 1992) (A law which regulated kosher foods and required the state to interpret kosher laws violated the Establishment Clause as excessively entangled religion with government action.) Furthermore, taking legal sides in a religious dispute violates the Establishment Clause as it leads to excessive entanglement of government action with religion. See *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1038 (7th Cir. 2006) ("A suit to remove a priest on the ground that he is a heretic, or to reinstate a parishioner who has been excommunicated, . . . has never been justiciable in the federal courts."); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1304 (11th Cir. 2000) (The Establishment Clause mandates that churches retain exclusive control over strictly ecclesiastical matters. Investigation into church's view of whether individual was suited for a particular clergy position excessively entangled government and religion of the church.)

However, secular legal action does not violate the Establishment Clause in disputes between a church

and clergy where the issue does not involve questions of ecclesiastical doctrine or belief. *Dobrota v. Free Serbian Orthodox Church St. Nicholas*, 191 Ariz. 120, 126, 952 P.2d 1190, 1196 (App. 1998) (Legal action between church and clergy did not cause excessive entanglement as the issue revolved solely around the calculation of money damages arising from a breach of contract.) Even in a criminal case where, as here, a defendant raises religious laws as a defense, the Establishment Clause is not violated where the finder of fact is not required to interpret church doctrine. *State of North Dakota v. Burckhard*, 579 N.W.2d 194, 195 (N.D. 1998). In *Burckhard*, the defendant was a priest charged with theft of church property, and claimed that he had authority under canon law to spend the church's money for his personal purposes that were entirely unrelated to the church's business. *Id.* The trial court granted the defendant's motion to dismiss the complaint against him on the basis that the case excessively entangled religion with state action. *Id.* The North Dakota Supreme Court vacated the dismissal, stating:

We are not convinced prosecution of these charges requires the court to interpret or review church doctrine, policy, or laws. As in any theft case involving allegations the defendant misused funds entrusted to him, the State will need to produce evidence, through testimony of church officials or other appropriate means, of the authority entrusted to the defendant and conduct outside that authority. It is for the factfinder to decide

whether the defendant made unauthorized expenditures of church funds. The mere fact that a church official's wrongful conduct may violate church policy or canon law in no way precludes the same conduct from also violating and being prosecuted under secular criminal laws.

Id. at 201.

Although here the State charged the defendant with solely secular crimes against the victim-church, the Respondent Judge's order interjected religious doctrine into the proceedings by ordering the State to instruct the grand jury on canon law and Diocesan policy. Whether or not the defendant's actions could be justified before a church tribunal under canon law is a separate and distinct issue from whether he violated the laws of Arizona. Canon 1344 acknowledges the legitimacy of the separate secular legal system. (State's Appendix L at Exhibit A, page 2, ¶ 4.) The Respondent Judge, however, caused the defendant's religion and state action to become excessively entangled, as it required the grand jury to define the defendant's authority over church funds based upon its interpretation of canon law. The State asks this Court to recognize the secular nature of the grand jury proceedings, and requests this Court to reverse the July 6, 2007, and May 19, 2008, orders so as not to entangle religious doctrine with legal rules and procedure.

2. **The Equal Protection Clause of the Fourteenth Amendment prohibits, *inter alia*, denying citizens equal protection under the law. The State is required to instruct the grand jury of all applicable provisions of Arizona law. However, because the defendant is a priest and worked for the victim church, the Respondent Judge ordered the State to also instruct the grand jury on both canon law and Diocesan policy and procedure. The State has not been ordered to instruct the grand jury of church doctrine and policy when non-clergy defendants were charged with offenses against a church. The Respondent Judge's orders violate the Equal Protection Clause because they provide the defendant with special rights and criminal defenses based upon his religious affiliation.**

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution prohibits, *inter alia*, denying citizens equal protection under the law. "That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court." *Shelly v. Kraemer*, 334 U.S. 1, 14 (1948). The United States Supreme Court has recognized that, "[S]tate action in violation of the Amendment's provisions is equally repugnant to the constitutional commands

whether directed by state statute or taken by a judicial official in the absence of statute." *Id.* at 15. In addition, the United States Supreme Court has recognized how the apparent state sanction of one religion over all others can cause violence and political divergence. *Engel v. Vitale*, 370 U.S. 421, 429 (1962) (Court provided historical overview of the Establishment Clause in holding that state school prayer program, which incorporated particular religious beliefs, violated the First and Fourteenth Amendments); *Everson*, 330 U.S. 1, 11-13 (1947) (Court provided historical overview of need to separate church and state in holding that state transportation for both public and parochial school students did not violate the First and Fourteenth Amendments). To pass Equal Protection scrutiny, State action which treats groups of people differently must be shown to bear a rational relationship to a permissible state objective. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *McGowan v. Maryland*, 366 U.S. 420, 425 (1961).

The permissible state objective in overseeing the grand jury process is to insure that defendants are afforded due process and that people are held accountable for their actions. Due to the very nature of the grand jury, defendants are not entitled to all of the protections that are afforded defendants in jury trials. *O'Meara v. Gottsfield*, *supra* at 578, 851 P.2d at 1377. The Respondent Judge's July 6, 2007, and May 19, 2008, orders that the State instruct the grand jury on canon law and Diocesan policy and procedure

clearly treats the defendant differently from others who have been charged with crimes against the church. In essence, those orders have provided the defendant with special rights and criminal defenses based upon his religious affiliation. The orders bear no rational relationship to the permissible state objective, and therefore violate the Equal Protection Clause.

VI. Conclusion

For all the reasons set forth in this Petition and its Appendices, the State asks this Court to accept jurisdiction, grant relief, and issue an Opinion for the guidance of the Arizona legal community.

Submitted July 18, 2008.

ANDREW P. THOMAS
MARICOPA COUNTY
ATTORNEY

By /s/ Elizabeth Ortiz
Elizabeth Burton Ortiz
Deputy County Attorney

CERTIFICATE OF COMPLIANCE

The undersigned deputy states that the foregoing Petition has been prepared in double-spaced 14-point Arial font, a proportional roman typeface, and that the Petition, exclusive of the face sheet, Certificate of Compliance, and the mailing information, contains 3,836 words, according to the word counting feature of the word processor used to prepare this brief. This

deputy avows that this Petition complies with the requirements of Rule 7(e), Rules of Procedure for Special Actions, and Rule 31.12, Ariz. R. Crim. P.

Submitted July 18, 2008.

ANDREW P. THOMAS
MARICOPA COUNTY
ATTORNEY

By /s/ Elizabeth Ortiz
Elizabeth Burton Ortiz
Deputy County Attorney

Copy of the foregoing
mailed\delivered this
18th day of July, 2008,
to:

The Honorable Silvia R. Arellano
Judge of the Superior Court

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BY: /s/ Elizabeth Ortiz
Elizabeth Burton Ortiz
Deputy County Attorney

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No. 08-1240

Supreme Court, U.S.
FILED

MAY 8 - 2009

OFFICE OF THE CLERK

**In The
Supreme Court of the United States**

STATE OF ARIZONA, EX REL. ANDREW P. THOMAS,
MARICOPA COUNTY ATTORNEY,

Petitioner,

versus

SILVIA R. ARELLANO, JUDGE, SUPERIOR COURT
OF ARIZONA, MARICOPA COUNTY,
AND DENNIS RICCITELLI,

Respondents.

**On Petition For Writ Of Certiorari
To The Arizona Court Of Appeals**

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent Dennis Riccitelli is an ordained priest of the Roman Catholic Church and was the pastor of Holy Cross Catholic Church. Riccitelli was indicted on ten counts of theft and four counts of fraudulent schemes and artifices. The Catholic Church is the alleged victim. Riccitelli filed a motion to remand the case to the grand jury for a new probable cause determination. Among other claims, he asserted that the State failed to instruct the grand jury on applicable canon law and Diocesan policy and procedure. The Respondent Judge granted Riccitelli's motion and remanded the matter to the grand jury for a new determination of probable cause. Along with other instructions, Respondent Judge ordered the State to instruct the grand jury on both applicable canon law and Diocesan policy and procedure. Ten months later, the State first raised the Questions Presented in the form of a motion to clarify the order, which was denied by the Respondent Judge. The Arizona Court of Appeals and the Supreme Court of Arizona both denied the State relief from the Respondent Judge's order.

The issues presented for review by Petitioner are:

1. The Establishment Clause of the First Amendment prohibits government action which does not have a secular purpose and which is excessively entangled with religion. Did the Respondent Judge's

QUESTIONS PRESENTED – Continued

order violate the Establishment Clause by entangling church doctrine and policy with the required grand jury instructions?

2. The Equal Protection Clause of the Fourteenth Amendment prohibits, *inter alia*, denying citizens equal protection under the law. Did the Respondent Judge's orders violate the Equal Protection Clause by providing Riccitelli with special rights and criminal defenses based upon his religious affiliation?

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OPINION BELOW

The Respondent Judge, who is a judge of the Maricopa County Superior Court, along with other instructions, ordered the State to instruct the grand jury on applicable canon law and Diocesan policy and procedure for consideration in determining whether probable cause exists to indict Riccitelli for theft and fraudulent schemes against the Catholic Church based on his handling of parish financial matters. The Respondent Judge found that evidence of applicable canon law and Diocesan policy and procedure was clearly and directly relevant because the grand jury was asked to determine whether Riccitelli exceeded the authority granted him under church policies and law, and if so, whether in so doing he violated Arizona law. The Respondent Judge found that the failure to present evidence of applicable canon law and Diocesan policy and procedure constituted the deprivation of a substantial procedural right. The State challenged the ruling arguing that canon law and Diocesan policy and procedure are neither secular law nor clearly exculpatory evidence which the State would be required to present to the grand jury. The Arizona Court of Appeals and the Supreme Court of Arizona both denied relief. Subsequently, and ten months after the Respondent Judge issued her order remanding the matter for a new determination of probable cause, the State first raised the Questions Presented in the form of a motion to clarify the order by asserting that the original order violated the Establishment and Equal

Protection Clauses. The Respondent Judge denied the motion, and again both the Arizona Court of Appeals and the Supreme Court of Arizona denied the State relief.

STATEMENT OF JURISDICTION

The Arizona Supreme Court filed its decision denying review on January 6, 2009. Petitioner filed its writ timely within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, § 2; 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides in part that:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On December 21, 2004, Respondent Dennis Riccitelli was indicted on one count of theft, a class 2 felony, eight counts of theft, class 3 felonies, one count of theft, a class 5 felony, and four counts of fraudulent schemes and artifices, class 2 felonies. The alleged offenses are alleged to have occurred between January 1, 2001, and December 31, 2003. At that time, Riccitelli was an ordained priest of the Roman Catholic Church and pastor of Holy Cross Catholic Church. In indicting Riccitelli, the State alleged that Riccitelli exceeded his discretion and authority in financial matters at Holy Cross Parish.

On February 4, 2005, Riccitelli filed a Motion to Remand for New Determination of Probable Cause, and requested an extension of time to file a supplemental, substantive motion. On February 8, 2005, the trial court granted Riccitelli leave to "supplement the motion as needed."

On May 14, 2007, Riccitelli filed a Motion to Dismiss Indictment or in the Alternative to Remand for a New Determination of Probable Cause. (Petitioner's App. E). Among other claims, Riccitelli argued that the State presented false, misleading, and incomplete testimony regarding canon law, Diocesan policy and procedure, and the pastor's role in parish

financial matters, failed to instruct and accurately instruct the grand jury on relevant canon law and Diocesan policy and procedure, and impermissibly interfered with questioning by the grand jurors on these issues.

The State filed a written response, objecting to the motion, but failed to raise either of the Questions Presented.

On July 6, 2007, the Respondent Judge remanded the case for a new determination of probable cause by the grand jury. (Petitioner's App. C). Among other findings of error, the Respondent Judge found that:

[The] State failed to instruct the grand jurors on Cannon [sic] Law and Diocesan Policy and Procedure. The relevance of the evidence is clear; the grand jurors were required to make a determination of whether Defendant Riccitelli's conduct exceeded the authority granted him by church policies and law, and if so, did Defendant's conduct violate Arizona law. Church law and policies are directly relevant in determining whether Defendant committed the crimes he is charged with, that is, whether Defendant exceeded his authority in dealing with church financial matters.

(*Id.* at 8).

On August 2, 2007, Riccitelli filed a Motion to Dismiss for failure of the State to file a complaint or commence grand jury proceedings within 15 days of

the Respondent Judge's remand order of July 6, 2007. Riccitelli argued that although he had been indicted by a county grand jury and not a state grand jury, the Arizona rule requiring the filing of a complaint or commencement of grand jury proceedings within 15 days of a remand order in state grand jury matters should apply. The State filed its objection, and the Respondent Judge denied Riccitelli's motion.

The State then filed its first Motion to Clarify Order on October 3, 2007, requesting that Respondent Judge clarify her remand order of July 6, 2007, by specifically asking the court to clarify whether it found that the intentional and unintentional false, misleading and incomplete testimony of one of the State's witnesses at the grand jury was in violation of law and/or an issue under *Brady*, or whether the testimony offered was an issue of officer competency. The State did not raise either of the Questions Presented at that time.

On September 12, 2007, the State filed its first Petition for Special Action contesting Respondent Judge's remand order of July 6, 2007. The Arizona Court of Appeals declined jurisdiction and the Supreme Court of Arizona subsequently denied the State's Petition for Review.

On May 5, 2008, the State filed its second Motion for Clarification of Order; first raising the Questions Presented ten months after the remand order in question was issued by Respondent Judge and after having already sought interlocutory relief from both

the Arizona Court of Appeals and the Supreme Court of Arizona. (Petitioner's App. F'). In this second Motion to Clarify, the State requested that Respondent Judge "reconsider and clarify" her order. (*Id.* at 72).

On May 19, 2008, the Respondent Judge denied the State's second Motion to Clarify. (Petitioner's App. B). In so doing, the Respondent Judge noted that the State did not argue that the remand order was ambiguous or confusing, but rather, the State asked that the court reverse its ruling. (*Id.* at 5). The Respondent Judge found that the State's second Motion to Clarify was "in actuality a Motion for Reconsideration" and treated it as such. (*Id.*).

The State again filed a Petition for Special Action in the Arizona Court of Appeals. (Petitioner's App. G). Again, the Court of Appeals declined to accept jurisdiction. Subsequently, the State filed its Petition for Review, which was denied by the Supreme Court of Arizona on January 6, 2009. (Petitioner's App. D).

Respondent Riccitelli posted a substantial bond at the inception of this case and remains on supervised release. His United States passport was surrendered pending resolution of the matter.

REASONS WHY THE WRIT SHOULD BE DENIED

The Respondent Judge's order has a secular purpose, does not foster excessive entanglement with

religion, and does not provide Riccitelli with special rights based on his religious affiliation. Accordingly, the order does not violate the Establishment and Equal Protection Clauses as asserted by the State. The order directs the State to instruct the grand jury on the relevant and necessary facts of the case in order to make a purely secular decision. Those facts are the authority granted Riccitelli in financial matters under church policy, procedure and law. Without knowledge of that authority, it is impossible for the grand jurors to determine whether there is probable cause to conclude that Riccitelli violated state law by exceeding his authority. The canon law and Diocesan policy and procedure are necessary facts for consideration in making the purely secular decision of whether state law was violated. All findings will be secular, avoiding excessive entanglement with religion.

The Respondent Judge did not single out Riccitelli for special defenses and rights any more than if she had instructed the State to inform the grand jury of the authority granted a chief financial officer by the bylaws of a corporate employer in a similar case with a secular corporate business victim.

The State expresses concern that this order will permit Muslim suspects to invoke Sharia law or members of certain sects of Latter-Day Saints to invoke their doctrine in defending against charges of spousal abuse or child molestation. Though the State does not specify what concern it has with regard to Muslims and Sharia law, presumably Petitioner is concerned with such defenses in cases of terrorism,

polygamy, or spousal abuse. Murder, spousal abuse, polygamy, and molestation are against the secular laws of this land. Whether a church's law, policy, or procedure permits those acts to be committed by its clergy or members is irrelevant under secular law. However, when a church employs a cleric and entrusts him with financial responsibilities, the parameters of his authority as defined by his employer become relevant in determining whether secular law was violated in his handling of his employer's financial matters if it is alleged that he committed a crime by exceeding his authority.

The State claims a violation of the Equal Protection Clause because the State has not been ordered to instruct the grand jury on church law, policy and procedure when non-clergy defendants were charged with offenses against a church. However, if a layperson were employed by a church and entrusted with financial responsibilities with respect to the employer church's funds, then the employer church's guidelines for the authority placed in that person would become relevant and necessary in order to determine whether the accused violated state law by exceeding her authority and thereby committed theft or fraud. There are no special rights conferred by this order, only relevant facts for the grand jury to consider.

- I. **Certiorari is not warranted because the Establishment Clause of the First Amendment is not violated when the Respondent Judge's remand order serves a secular purpose and does not foster excessive entanglement of grand jury proceedings with religion where the order directs the State to provide the grand jurors with the relevant facts necessary to make a secular determination under state law.**

It is an undisputed fact that Riccitelli was and remains an ordained priest of the Roman Catholic Church. The State alleges that he stole from the parish that was entrusted to his care by exceeding his authority in dealing with the parish's financial matters. The Respondent Judge simply agreed with Riccitelli that in order to determine whether probable cause existed as to whether he had exceeded his authority in financial matters and in so doing committed a criminal offense under state law, the grand jury would have to know what his authority was. That authority is outlined in canon law and Diocesan policy and procedure.

In her order of July 6, 2007, the Respondent Judge ruled that:

The relevance of the evidence is clear; the grand jurors were required to make a determination of whether Defendant Riccitelli's conduct exceeded the authority granted him by church policies and law, and if so, did Defendant's conduct violate Arizona law.

Church law and policies are directly relevant in determining whether Defendant committed the crimes he is charged with, that is, whether Defendant exceeded his authority in dealing with church financial matters.

(Petitioner's App. C at 8).

The Respondent Judge's ruling and her reasoning were correct and avoid any violation of the Establishment Clause. The State alleged in counts 1, 3, 4, 5, 7, 8, 9, 11, 12, and 14 of the indictment that Riccitelli "without lawful authority, knowingly" either "obtained" or "controlled" the alleged victim parish's money. The grand jurors are unable to determine whether there is probable cause to believe that Riccitelli exceeded his authority without knowing what his authority was. He cannot have stolen from and defrauded his parish unless he exceeded his authority according to the rules governing his conduct and in so doing violated the laws of the State of Arizona.

As a practical matter, the State recognized this in its presentation to the grand jury. The State presented false, inaccurate and incomplete references to canon law and Diocesan policy and procedure in securing the indictment. (*See generally* Petitioner's App. E). The State cannot have it both ways and must present the applicable standards of Riccitelli's authority in an accurate and complete fashion.

Advising the grand jurors as ordered by the Respondent Judge serves a secular purpose. The

secular purpose is to provide the grand jurors with the relevant and necessary facts in order to determine whether Riccitelli exceeded his authority in managing and spending his employer's funds, and in so doing whether he violated secular law. Given that relevant canon law and Diocesan policy and procedure are necessary facts, and all findings will be made under secular law, there is no excessive entanglement with religion.

The State cites many cases in support of its argument that the Respondent Judge's order fosters excessive entanglement with religion. (See Petition at 11-13). However, the matter at hand is readily distinguished. Riccitelli and the Respondent Judge do not ask the courts to decide a lawsuit between a person or clergy and his church. No one is asking the grand jurors to interpret canon law and church policy and procedure as the final determination for resolution of a legal dispute. The grand jurors are not to be asked to pass on the propriety or legality of canon law and Diocesan policy and procedure. Following the Respondent Judge's order would not require the grand jury to determine whether Riccitelli could be prosecuted under canon law. Rather, the order requires that the State present the standards of Riccitelli's authority in parish financial matters so the grand jurors can determine whether he exceeded that authority, and in so doing whether he acted "without lawful authority" and violated Arizona law as alleged by the State.

The State's citation of *State of North Dakota v. Burckhard*, 579 N.W.2d 194 (N.D. 1998) is curious. In

that case involving a Roman Catholic priest and alleged theft from his parish, the Supreme Court of North Dakota found no excessive entanglement of government and religious affairs and therefore no violation of the First Amendment in the court's exercise of jurisdiction over the criminal matter. (*Id.* at 195). Riccitelli has made no claim that the First Amendment of the United States Constitution bars prosecution, and the Respondent Judge has not so ordered. Moreover, and as noted by the State, that court found "[a]s in any theft case involving allegations the defendant misused funds entrusted to him, the State will need to produce evidence, through testimony of church officials or other appropriate means, of the authority entrusted to the defendant and conduct outside of authority." (*Id.* at 201). This is precisely what was ordered by the Respondent Judge.

If Riccitelli were the chief financial officer of a corporation, the corporation would have rules defining his authority to use and dispose of corporate funds. No one would argue that the grand jurors should not be advised of the parameters of his authority in order to determine if he exceeded that authority and in so doing committed a criminal act. That Riccitelli was employed by a church and not a typical corporation, and the rules defining his authority were therefore church rules, makes no difference. To hold otherwise would be to hold Riccitelli to a different standard and would provide no reasonable basis for the grand jurors to determine whether Riccitelli acted "without lawful authority" in violation of state law.

Referring the grand jurors to the rules that determine Riccitelli's authority neither establishes a religion nor prohibits the free exercise thereof.

II. Certiorari is not warranted because the Equal Protection Clause of the Fourteenth Amendment is not violated by the Respondent Judge's remand order when the order directs the State to provide the grand jurors with the necessary facts to determine whether Riccitelli exceeded the authority granted him by his employer church in financial dealings with church funds and in so doing violated state law. No special class is created, and no special rights and defenses based on religious affiliation are conferred.

The State alleges that Respondent Judge's remand order violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by denying citizens equal protection under the law. The State argues that the order provides Riccitelli with special rights and defenses based upon his religious affiliation because the State is not ordered to similarly instruct the grand jury on canon law and Diocesan policy and procedure when non-clergy defendants are charged with offenses against the church. The State fails to understand that it is not Riccitelli's religious affiliation that makes canon law and Diocesan policy and procedure relevant, but

the fact of his employment, which happens to be with a church.

Canon law and Diocesan policy and procedure are the rules that govern Riccitelli's employment. They are the regulations that outline his authority to handle, manage and spend his employer's funds. There is no argument under canon law and Diocesan policy and procedure that the parish priest is immune from prosecution for criminal theft or fraud in his handling of parish finances. There are no special defenses or rights based on religious affiliation, but based on his employment there are relevant and necessary facts for the grand jury to consider. Canon law and Diocesan policies and procedures are necessary facts for the grand jurors' consideration in determining whether Riccitelli exceeded the authority granted him by his employer and in so doing violated state law.

Similarly, if a layperson were employed by a church and entrusted with financial responsibilities with respect to the employer church's funds, then the employer church's rules, policies, and procedures defining the authority placed in that person would likewise become relevant and necessary in order to determine whether the accused layperson exceeded her authority and in so doing committed theft or fraud. Therefore, no special class has been created by the Respondent Judge's order. Religious affiliation is not the issue, the authority conferred on the accused by his employer is. There are no special rights

conferred by this order, only relevant facts for the grand jury to consider.

CONCLUSION

The underlying remand order by the Respondent Judge does not violate the Establishment and Equal Protection Clauses as asserted by the State because the Respondent Judge's order has a secular purpose, does not foster excessive entanglement with religion, and does not provide Riccitelli with special rights based on his religious affiliation. The order simply directs the State to instruct the grand jury on the relevant and necessary facts of the case in order to make a purely secular decision. Those facts are the authority granted Riccitelli by his employer in financial matters under church policy, procedure and law. The secular purpose is clear. That purpose is to let the grand jurors have the relevant facts that are necessary to the determination of whether state law was violated. Without knowledge of the authority granted Riccitelli by his employer in financial matters, it is impossible for the grand jurors to make the legal decision as to whether there is probable cause to conclude that Riccitelli exceeded his authority and in so doing violated state law. All findings will be secular, avoiding excessive entanglement with religion. The Respondent Judge did not single out Riccitelli for special defenses and rights any more than if she had instructed the State to inform the grand jury of the authority granted a chief financial

officer under the bylaws of a corporate employer in a similar case with a secular corporate business victim. Religious affiliation is not the issue, the authority conferred on the accused by his employer is.

Respectfully submitted,

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